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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON, *Appellant,*

v.

ADMINISTRATOR OF GENERAL SERVICES,
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS, *et al.,*
JACK ANDERSON,
LILLIAN HELLMAN, *et al., Appellees.*

On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLEES THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN HISTORICAL ASSOCIATION, AMERICAN POLITICAL SCIENCE ASSOCIATION, ET AL.

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BRIEF OF APPELLEES THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.[1]

OPINION BELOW

The opinion of the three-judge court is reported at 408 F. Supp. 321 and is reprinted in the Appendix to the Jurisdictional Statement (J.S. 1a-106a).

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[1] The Reporters Committee for Freedom of the Press is an organization devoted to promoting the First Amendment and freedom of information interests of the working press in all media. The American Historical Association is composed of approximately 18,000 scholars engaged in the study, teaching and writing of history. The American Political Science Association, which has approximately 17,000 members, is the principal professional or-

QUESTIONS PRESENTED

The central question presented in this case is whether the records of the government's highest executive office over five and one-half crucial years of the nation's history may be preserved and regulated by government officials in accordance with publicly established rules and procedures, or whether those records must, despite the remedial efforts of Congress and the incumbent President, be turned over to an ex-President—a private person with no public accountability—whose sole discretion would control their preservation, suppression or destruction. More particularly, the questions presented are:

1. Whether the doctrine of "separation of powers" prohibits Congress and the executive branch from jointly establishing a program for the preservation, in the executive branch, of the records of a presidential administration.

2. Whether the doctrine of "presidential privilege" subordinates the continuing needs of succeeding administrations, the Congress and the courts for the records of an administration to the interest of a former

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ganization in the United States devoted to research and education on politics and government.

In addition to the organizations described above, the appellees represented in this brief include James MacGregor Burns (Professor of Political Science at Williams College); Nat Hentoff (author and columnist); Donald Herzberg (Professor of Government and Dean of the Graduate School of Georgetown University); William Leuchtenberg (Professor of American History at Columbia University); Arthur Link (Professor of American History at Princeton University); J. Anthony Lukas (author and reporter); Austin Ranney (Professor of Political Science at the University of Wisconsin); and Clement Vose (Professor of Government at Wesleyan University).

President in treating them as his own personal property.

3. Whether White House records generated in the transaction of public affairs are government property, subject to custody and disposition in accordance with public law, rather than the private property of an ex-President.

4. Whether preservation of the records of the Nixon administration pursuant to the Presidential Recordings and Materials Preservation Act constitutes a bill of attainder.

5. Whether the fact that Mr. Nixon intermingled some of his personal papers with a vastly greater quantity of government records concerning the performance of his official duties entitles Mr. Nixon to exclusive personal control over all such public records, notwithstanding the fact that the Presidential Recordings and Materials Preservation Act guarantees that personal materials will be returned to Mr. Nixon as promptly as possible and in complete confidence.

STATEMENT

A. The Materials at Issue

The materials covered by the Presidential Recordings and Materials Preservation Act, Pub. L. 93-526, 88 Stat. 1695, 44 U.S.C. § 2107 note (Supp. I) (hereinafter "the Act") constitute the records of the highest offices of the executive branch of the government of the United States from January 20, 1969 to August 9, 1974. They consist of documents prepared by government employees, working on government time and utilizing government facilities, in the course of discharging their official governmental duties. They relate

to the entire range of the foreign and domestic issues considered by our government in recent years.

The record below establishes that the materials claimed by Mr. Nixon consist of some 42 million pages of documents and 880 reels of tape-recorded conversations.[2] Mr. Nixon has admitted that he never saw more than 200,000 of the documents at issue. Nixon Dep. Tr. at 15-16, App. 515-17.[3]

Many of the materials preserved by the Act are of critical importance to the ongoing conduct of the federal government—a government which is a continuing process that does not begin anew whenever an individual President departs office. The record below establishes that various records from Mr. Nixon's administration were needed, and in the future will be needed, by the Ford and Carter administrations, by Congress,

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[2] Mr. Nixon asserts, without citing any evidence, that the estimate of 42 million pages may be "inflated." App. Brief at 25. That figure, however, was the estimate of the GSA custodians of the documents. See *Hearings on GSA Regulations Implementing Presidential Recordings & Materials Preservation Act before the Senate Committee on Government Operations,* 94th Cong., 1st Sess. at 83 (1975).

Mr. Nixon further states that approximately 18.7 million of the documents consist of birthday greetings, correspondence, and extra copies of records filed elsewhere. App. Brief at 25-26. Assuming that this is true, Mr. Nixon is still claiming personal ownership of more than 20 million pages of records relating to government business which are *not* extra copies and are *not* birthday greetings and the like. The fact that Mr. Nixon now contends that he may have seen as much as one percent of the documents at issue, rather than one-half of one percent as he originally testified, is hardly grounds for reversing the decision of the court below.

[3] References herein to the principal appendix will be cited as "App.—." References to the appendix to Mr. Nixon's Jurisdictional Statement will be cited as "J.S. App.—." References to Mr. Nixon's brief will be cited as "App. Brief —."

by the federal courts, and by the public as a whole. *See* J.S. App. 52a-61a, 408 F. Supp. at 350-55.

For example, during the course of this litigation the Justice Department disclosed that "the National Security Council has a group of files which they are constantly using, which are part of the White House papers . . . ."[4] The following NSC materials are among the documents which Mr. Nixon now claims as his own personal property:

> "—Memoranda to the President for his information, review, and decision, including proposed Presidential decisions and instructions.
>
> —Memoranda of conversations between the President and foreign heads of Government/State and other foreign dignitaries including, but not limited to Foreign Ministers and other Cabinet officers, Ambassadors and Special Emissaries.
>
> —Records of appointments and meetings with U.S. Cabinet officers and other officials pertaining to national security matters.
>
> —Intelligence reviews, reports and analyses pertaining to national security affairs.
>
> —Defense-related papers associated with deployment of forces, budget, research and development, and organization/command structure.
>
> —Telegrams originating in the White House dispatched to foreign governments, U.S. ambassadors, and force commanders relating to foreign policy and national security decisions.
>
> —Sensitive incoming cable traffic associated with negotiations, plans, evaluations, and the impact of decisions taken on national security." App. 334-35.

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[4] *Nixon* v. *Sampson,* Civ. No. 74-1518 (D.D.C.), Transcript of Hearing at 141 (Oct. 21, 1974).

As one would expect, these sensitive documents have already been needed by Mr. Nixon's successors. During this litigation, General Brent Scowcroft, Deputy to the Secretary of State in charge of the NSC, entered the vault containing some of the materials at issue in order to secure the correspondence between Mr. Nixon and former President Thieu of South Viet Nam. This review coincided with the national debate at the time of the fall of South Viet Nam as to whether Mr. Nixon had made secret commitments to use American troops to enforce the 1973 Paris accords. Without ready access to the Nixon-Thieu correspondence documenting the nature of these commitments, American interests could have been seriously jeopardized. *See* Affidavit of Jeanne W. Davis, Staff Secretary to the National Security Council ¶ 13, App. 260-61. Other NSC documents, which Mr. Nixon now claims as his own personal property, were similarly consulted by government officials during the course of this litigation in connection with critical decisions on our negotiating posture in the SALT talks, the Middle East peace proposals, and President Ford's meeting with leaders of the People's Republic of China. Davis Affidavit ¶¶ 10-14, App. 259-61.

The National Security Council files are not the only important government documents which Mr. Nixon here claims as his own personal property. The materials at issue include a vast array of other government documents prepared by or for members of the White House staff, including the files of a number of presidential commissions, committees and boards which operated during Mr. Nixon's five and one-half years in office. App. 332-36. In Mr. Nixon's own words, the materials include every document of any kind "pre-

pared and sent to members of the White House Staff from the Executive Agencies, or [from] a member of the White House Staff to a member of the White House Staff . . . ." Nixon Dep. Tr. at 86, App. 574. The materials at issue thus record the official actions of the President and all of his staff—those which relate to duties specified by the Constitution, to the President's supervision of cabinet offices and presidential appointees, and to his general administration of the executive branch of government. Nixon Dep. Tr. at 28-30, App. 525-27.

In addition to the continuing needs of the executive branch, many of the materials which Mr. Nixon now claims relate to matters of continuing congressional concern. For example, during the course of this litigation—and over Mr. Nixon's opposition—the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities obtained access to some of the documents at issue during its review of the nation's intelligence programs.[5]

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[5] When the Senate committee sought access to these materials, the Ford administration indicated that it intended to make them available. *See Government's Motion for an Order Permitting Search of the Presidential Materials of the Nixon Administration,* filed in *Nixon* v. *Sampson,* Civ. No. 74-1518 at 5-6 (D.D.C. August 25, 1975). Mr. Nixon opposed any such access until it became clear that litigation would ensue in which President Ford would not support his resistance. *See id.,* Exs. G and H (letters exchanged between counsel for President Ford and Mr. Nixon).

In contrast to the ultimate success of the Senate Select Committee, President Ford's own commission on CIA activities within the United States was unable to review some of the materials at issue in this case which were directly relevant to its mandate. Because of the commission's short life, it could not undertake litigation to overcome Mr. Nixon's opposition to access. *See Report to the President by the Commission on CIA Activities within the United States* at 172 n.1 (1975).

Other congressional committees have not been as successful. Shortly after the fall of South Viet Nam, Senator Abourezk, Chairman of the Senate Subcommittee on Separation of Powers, requested access to documents concerning secret United States-South Vietnamese agreements. Intervenor-Defendants' Evidentiary Submission in the court below, filed July 31, 1975, *Letter from James Abourezk to Philip W. Buchen,* (June 9, 1975). Mr. Nixon opposed this request on the ground that the review of the Vietnamese situation was not "current government business" under the temporary restraining order issued as a result of this litigation. Int.-Def. Ev. Sub., *Letter from Herbert J. Miller to Philip W. Buchen* (July 2, 1975). The record below catalogues a number of other congressional requests for documents which have similarly been opposed by Mr. Nixon after his departure from office.[6]

The materials at issue have also been needed, and are currently needed, in a wide range of judicial proceedings. Subpoenas for some of the materials have been served in a number of cases, but Mr. Nixon has consistently resisted production and has impeded the efforts of both the incumbent administration and the courts to arrive at a just determination of these mat-

[6] *See* Int.-Def. Ev. Sub., Letter from Representative John D. Dingell, Chairman of the House Select Committee on Small Business, to Philip W. Buchen (January 15, 1975) and the response thereto by Herbert J. Miller to Philip W. Buchen (January 30, 1975); Int.-Def. Ev. Sub., Letter from Laurence N. Woodworth, Chief of Staff of the Joint Committee on Internal Revenue Taxation, to Philip W. Buchen (March 13, 1975) and the response thereto from Herbert J. Miller to Philip W. Buchen (March 27, 1975). *See also* Affidavit of Raymond G. Larroca ¶ 6, App. 213-14.

ters. These proceedings have included the investigation and prosecution of Watergate matters. But they have also included other civil and criminal proceedings in various courts throughout the nation. *See* J.S. App. 60a-61a, 408 F. Supp. at 354.[7]

Finally, the record below establishes that the materials at issue include documents essential to an understanding by the American people of matters of continuing public concern—an understanding essential for the healthy operation of the republican form of government established by the Constitution. *See* J.S. App. 49a-52a, 58a-59a, 408 F. Supp. 349-50, 353.

The Nixon-Sampson agreement, which is discussed below, purported to give Mr. Nixon sole authority over all of the records of his years in office. It raised the spectre that those critically important documents would be permanently suppressed or destroyed. Congress and President Ford perceived that this situation posed a grave threat to the continuity of important federal government functions and to public confidence

[7] *See, e.g., United States* v. *National Broadcasting Co.,* 1974-2 Trade Cas. ¶ 75,396 (C.D. Cal. 1974); *Halperin* v. *Kissinger,* C.A. No. 73-1187 (D.D.C.); *Oliver* v. *Committee for the Re-Election of the President,* C.A. No. 1207-73 (D.D.C.); *Democratic National Committee* v. *McCord,* C.A. No. 1233-72 (D.D.C.); *Sun Oil Co.* v. *United States,* No. 806-71, (Ct. Cl.); *Dellums* v. *Powell,* C.A. No. 2271-71 (D.D.C.); *Apton* v. *Wilson,* C.A. No. 798-72 (D.D.C.); *Kuhn* v. *Wilson,* C.A. No 956-71 (D.D.C.); *Rothblatt* v. *Nixon,* C.A. No. 74-1080 (D.D.C.); *United States* v *Means,* Crim. No. 73-5035 (D. S.D.). App. 216-17.

Recently the Court of Appeals for the District of Columbia Circuit upheld one of these subpoenas and directed production of some of the materials at issue. *Dellums* v. *Powell,* No. 76-1336 (D.C. Cir., Jan. 28, 1977).

in the government itself. J.S. App. 58a-59a, 408 F. Supp. at 353.

B. Background of the Act

The Presidential Recordings and Materials Preservation Act is only the most recent legislation dealing with the preservation and disposition of the records of the executive branch of the federal government. The Federal Records Act of 1950, 44 U.S.C. §§ 2701-3314, and the Presidential Libraries Acts of 1950 and 1955, 44 U.S.C. §§ 2101 *et seq.*, established procedures to preserve government records and to acquire additional private materials pertaining to the Presidency. More recently, the Freedom of Information Act, 5 U.S.C. § 552, was promulgated to insure that the records of the executive branch would be open to public scrutiny under regulations protecting legitimate governmental and personal confidences.

In 1973, the Watergate hearings and the controversy over personal tax deductions for "donations" of government materials focused national attention on the records of public officials. It became increasingly clear that the existing statutes were not achieving proper government retention and control, and Congress began to consider various reforms.[8]

On August 9, 1974, Mr. Nixon resigned the Presidency. Within hours, White House archivists were summoned to an emergency meeting and, working virtually around the clock, began to collect, for immediate shipment to California, the records of Mr. Nixon's five and one-half years in office. The archivists were

[8] *See, e.g.* H.R. 12116, 93d Cong., 1st Sess. (1973); S. 2951, 93d Cong., 2nd Sess. (1974).

"under great pressure to get the materials collected as rapidly as possible."[9]

On September 8, 1974, the White House disclosed the terms of an agreement between Mr. Nixon and the Administrator of the General Services Administration, Arthur Sampson, relating to the records of Mr. Nixon's years in office. That agreement provided that

> —All materials compiled during Mr. Nixon's administration were to be transported immediately to California (App. 39);
>
> —Mr. Nixon was to "retain all legal and equitable title to the Materials" (App. 39);
>
> —Mr. Nixon was to have an absolute veto over access to the materials by any party, including officials of succeeding administrations (App. 39);
>
> —After three years, Mr. Nixon could, "without formality," "withdraw . . . any or all of the Materials," except the tapes, for "any purpose," including destruction (App. 40; 10 Weekly Compilation of Presidential Documents at 1117);
>
> —After five years, Mr. Nixon could order the destruction of any or all of the tapes, and all of the

[9] Testimony of John Nesbitt in *Nixon* v. *Sampson*, C.A. Nos. 74-1518, 74-1533 and 74-1551, Nov. 15, 1974, Transcript at 60-61 (stipulated by the parties as part of the record below).

Mr. Nixon asserts that staff members were instructed to retain copies of documents needed for ongoing matters. App. Brief at 5. But the hollowness of this "instruction" is demonstrated by the fact that the staff members in question were those of Mr. Nixon's outgoing administration and that, in a matter of days, thousands of boxes of internal files were hastily gathered for shipment to Mr. Nixon in California. Nesbitt Testimony, Nov. 15, 1974 at 60-61, 80-83. In any event, it cannot be lightly assumed that such outgoing staff members could accurately guess which documents would be needed by future administrations.

tapes would be destroyed by September 1, 1984, or upon Mr. Nixon's death, whichever occurred first (App. 41).[10]

Announcement of the Nixon-Sampson agreement resulted in an immediate expression of concern from the Special Prosecutor, Congress, and the public. Several lawsuits were filed;[11] legislation was introduced; and hearings were held. Those hearings established that:

—Past practices concerning the preservation and disposition of presidential materials had been haphazard and, as a result, many papers from former administrations had been lost or destroyed;

—A comprehensive investigation was needed to develop general legislation governing the disposition and preservation of documents acquired by executive officials;

—The Nixon-Sampson agreement necessitated immediate action to preserve the materials of Mr. Nixon's years in office for use by future administrations, Congress, the courts, and the American people as a whole.[12]

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[10] Mr. Nixon repeatedly asserts in his brief that the Act at issue was drafted in great haste. But congressional consideration of the Act was far more deliberate than the hasty manner in which the Nixon-Sampson agreement was executed. On September 5, 1974, Mr. Nixon's personal attorney presented a draft that would, with minor changes, become the final agreement. Two days later, Mr. Sampson was summoned to a meeting where he read the agreement for the first time and signed it, without modification, approximately an hour later. *See Nixon* v. *Sampson*, 389 F. Supp. 107, 116 (D.D.C. 1975); Deposition of Arthur Sampson in *Nixon* v. *Sampson, supra*, at I 12-13, 20-21.

[11] These lawsuits are described at pp. 18-22, *infra*.

[12] *Hearings Before the Subcommittee on Printing of the Committee on House Administration on H.R. 16902 and Related Legislation*, 93d Cong., 2d Sess. at 32, 43, 49, 57-61, 67-70, 81-85, 88-91, 92-94, 145-48 (1974). *See also* H.R. Rep. No. 93-1507, 93d Cong., 2d Sess. at 8 (1974).

On October 4, 1974, the Senate considered and passed S. 4016, which ultimately became Title I of the Act. 120 Cong. Rec. 33975. The floor debates demonstrate that the Senate recognized

—That it had to act promptly to respond to the Nixon-Sampson agreement;

—That, with certain exceptions, it was important to provide public access to the materials at issue to restore public confidence in the governmental process and to prevent future abuses of public trust; and

—That existing legislation was inadequate to protect government records needed by both the executive and judicial branches from an unreliable custodian who had obtained the ostensible right to suppress and destroy any or all of those materials.[13]

Mr. Nixon asserts that it is "entirely clear from the legislative history" that the interest served by the

Mr. Nixon's assertion that the congressional hearings did not address the portion of the Act presently at issue (App. Brief at 128 n.58) is simply not true. The hearings are replete with testimony and submissions relating to the Nixon-Sampson agreement and the need to preserve the materials now at issue. *See Hearings . . . on H.R. 16902 and Related Legislation, supra*, at 26-31, 32, 39-42, 45-50, 54-56, 96-97, 102, 106, 118, 135-36, 148-50, 154-55.

In addition, the hearings reprinted Mr. Nixon's motion and brief in support of an injunction enforcing the Nixon-Sampson agreement and the answer in opposition thereto filed by The Reporters Committee, *et al. Id.* at 156-225. Congress was thus well aware of the factual and legal issues at stake.

[13] *See, e.g.*, 120 Cong. Rec. 31549-50 (Sept. 18, 1974) (Remarks of Sen. Nelson); 120 Cong. Rec. 33860-61 (Oct. 3, 1974) (Remarks of Sen. Javits); 120 Cong. Rec. 33873-74 (Oct. 3, 1974) (Remarks of Sen. Cranston); 120 Cong. Rec. 33874-75 (Oct. 3, 1974) (Remarks of Sen. Huddleston); 120 Cong. Rec. 33875-76 (Oct. 3, 1974) (Remarks of Sen. Ribicoff).

Act in the availability of documents for ongoing government business is nothing more than "an after-the-fact rationalization, not remotely contemplated by a single Senator or Representative who voted on the measure." App. Brief at 114-15. The House Report on the Act, however, made the continuing interests of all three branches of the federal government--and of the American people as well—perfectly clear:

> "By allowing Mr. Nixon to destroy all of the materials, the [Nixon-Sampson] agreement ignores the public interest in preserving them. *It ignores the legitimate continuing need for these materials in many judicial proceedings,* including some in which U.S. law enforcement will be frustrated and individual rights impaired if the materials are unavailable to the courts. *It ignores the needs of Congress and executive agencies for continued use of the documents in the process of government.* And it ignores the needs of historians, political scientists, and other scholars for the information these materials contain on the events of recent years and the workings of our government." H.R. Rep. No. 93-1507, 93d Cong., 2d Sess. at 3 (1974) (emphasis added).[14]

Similarly, Mr. Nixon's contention that Congress had no basis for finding that he might be an unreliable custodian of the materials at issue can only be described as staggering. Only a few weeks before the Act was introduced, the House Judiciary Committee, following a painstaking investigation which has no

[14] *See also* Section 102(d) of the Act which provides for access to the materials by any agency or department of the executive branch.

parallel in congressional history, concluded that Mr. Nixon's edition of the tapes concerning Watergate had "proven to be untrustworthy." H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. at 205 (1974). The Committee found that the transcripts personally prepared by Mr. Nixon contained "significant omissions, misattributions of statements, additions, paraphrases, and other signs of editorial intervention. . . ." *Id.* at 129.[15]

Based on this record, the House of Representatives—expressing the same concerns voiced by the Senate—passed S. 4016 on December 3, 1974. 120 Cong. Rec. 37906. On December 19, 1974, President Ford signed the Act into law. Mr. Nixon filed this lawsuit the following day.

C. Provisions of the Act

The Act directs the General Services Administration to collect and preserve the official documents and tape recordings made by government employees "which constitute the Presidential historical materials" of the Nixon administration. 44 U.S.C. § 2107, note (Supp. I), Section 101.[16] The Act gives Mr. Nixon

[15] Significantly, while Mr. Nixon now argues that he was entitled to a judicial determination on whether he have would been an unreliable custodian of the materials, he refused to answer any questions during his deposition about the discrepancies between his edited transcripts of some of the tape recordings in question and the transcripts prepared by the House Judiciary Committee. Counsel for Mr. Nixon made it clear that it was Mr. Nixon's position that he was entitled to control over all of the materials at issue regardless of whether he was responsible for altering the records of his administration. Nixon Dep. Tr. at 100-05, App. 585-90.

[16] The text of Title I of the Act is reprinted in Appendix I to Appellant's Brief.

and his designees full access to the materials "at all times" (Section 102(c)) and provides for like access by the Special Prosecutor (Section 102(b)) and other government agencies "for lawful Government use." (Section 102(d)).

The Act directs GSA to promulgate regulations which will make some of the materials available to the public. (Section 104). Pursuant to the Act, those regulations will meet the need to inform the public about "the abuses of governmental power . . . identified [as] . . 'Watergate'" (Section 104(a)(1)); the need to make the materials available for judicial proceedings (Section 104(a)(2)); the need to prevent general access to national security information (Section 104(a)(3)); the need to protect every individual's right to a fair trial (Section 104(a)(4)); the need to preserve "any legally or constitutionally based right or privilege which would prevent or otherwise limit access" (Section 104(a)(5)); the need to provide access to materials of historical significance (Section 104(a)(6)); and the need to give Mr. Nixon or his heirs "sole custody and use" of all personal materials (Section 104(a)(7)).

The Act further provides for judicial review of all of the regulations promulgated pursuant to the Act and of all decisions on the retention or publication of any of the materials. (Section 105(a)). The Act also provides that if any court concludes that preservation of the materials has deprived any person of private property, just compensation shall be paid to that person as determined by the court. (Section 105(c)).

Contrary to the repeated assertions in Mr. Nixon's brief, *the Act does not retain any of Mr. Nixon's personal papers for future publication or, indeed, for any other use.* The Act clearly provides that the government will retain and preserve only those materials prepared or received by public officials in the course of discharging their governmental duties. By its very terms, the Act applies only to "Presidential historical materials"—*i.e.*, those pertaining to the Presidency. (Section 101(b)(1)). Personal materials—such as notes from Mr. Nixon's daughters concerning their wedding plans—will not be retained regardless of their "historical" significance, because they do not concern Mr. Nixon's actions in office. Rather, the Act provides that all such materials will be returned to Mr. Nixon "for his sole custody and use." (Section 104(a)(7)).

The legislative history of the Act and the regulations which have thus far been proposed to implement it similarly leave no doubt that Mr. Nixon's personal papers will not be retained or publicized by the government. During the House debate, Representative Brademas, one of the co-authors of the Act, stated:

> "Materials of a purely personal nature, such as records from Mr. Nixon's private law practice or persons corresponding with his family, would be returned to him, pursuant to Section 105(a)(7) [now Section 104(a)(7)], to the extent they are found among the materials in the Government's possession." 120 Cong. Rec. 37903 (Dec. 3, 1974).

Consistent with this legislative intent, the regulations thus far proposed define the "private or personal materials" to be returned to Mr. Nixon to include all

> "papers and other documentary or commemorative materials in any physical form relating solely to a person's family or other nonpublic activities,

including private political association, and having no connection with his constitutional or statutory duties or political activities as President or as a member of the President's staff." Section 105-63.104(b) (April 13, 1976).

Thus, whether one looks to the Act, its legislative history, or the proposed implementing regulations, it is clear—as all of the appellees including the Government have consistently stated—that the Act does not apply to Mr. Nixon's personal papers. Mr. Nixon's insistence on mischaracterizing the reach of the Act, by arguing that it will retain and publicize his personal papers, can only be regarded as an effort to create constitutional impediments which in fact do not exist.

D. Proceedings in the Courts Below

In response to the concerns of the Special Prosecutor, Congress and the public at large, the Ford administration refrained from implementing the Nixon-Sampson agreement in the fall of 1974. On October 17, 1974 (approximately two months prior to final passage of the Act), Mr. Nixon sued Mr. Sampson and the federal government to compel compliance with the agreement. The Reporters Committee for Freedom of the Press, the American Historical Association, the American Political Science Association and other interested parties filed suit at approximately the same time to set aside the agreement and to prevent transfer of the materials to Mr. Nixon. These cases were consolidated with Mr. Nixon's action and were heard by the District Court for the District of Columbia.[17] On

[17] These cases were referred to in the courts below as the "consolidated cases."

January 31, 1975, the district court ruled that the vast preponderance of the materials now in issue were owned by the government and that the Nixon-Sampson agreement was therefore invalid. The court also ruled that claims of executive privilege could be asserted only by the incumbent President and not by a former Chief Executive. *Nixon* v. *Sampson,* 389 F. Supp. 107 (D.D.C. 1975).

On December 20, 1975, Mr. Nixon filed the present action against the United States, challenging the constitutionality of the Act here at issue. Mr. Nixon requested that a three-judge court be convened and that proceedings in the consolidated cases be stayed to permit his challenge to the statute to be decided immediately.[18] The court of appeals agreed that the present action should take priority and therefore stayed the decision of the district court in *Nixon* v. *Sampson, supra. Nixon* v. *Richey,* 513 F.2d 430 (D.C. Cir. 1975).

The Reporters Committee for Freedom of the Press and other parties in the consolidated cases moved to intervene in the present case because of their interest in preservation of, and ultimate access to, the presidential materials, as established by the district court in *Nixon* v. *Sampson.* These parties also asked to intervene because they intended to present certain legal arguments supporting the Act beyond those being presented by the Government.

The Reporters Committee, *et al.* were permitted to intervene, and a three-judge court was convened. All

[18] Mr. Nixon contended that the Act was unconstitutional on its face and that its constitutionality could be decided immediately, without reference to the content of the regulations that would be promulgated thereafter.

parties made substantial evidentiary submissions, including depositions and exhibits that had been filed in the consolidated cases. After briefing and argument, the court rendered its decision on January 7, 1976.

The court first held that preservation of the materials at issue does not impinge on the powers or privileges of the Presidency. J.S. App. 31a-66a, 408 F. Supp. at 340-57. Recognizing that President Ford had signed the Presidential Materials Act into law and that his administration was actively defending it against Mr. Nixon's "separation of powers" and "presidential privilege" claims, the court found "much to commend" the position that the theoretical impairment of executive powers perceived by Mr. Nixon, but not recognized by the incumbent President, "could not be the basis for invalidating the Act." J.S. App. 37a, 408 F. Supp. at 343.

Nevertheless, the court carefully considered Mr. Nixon's "separation of powers" and "presidential privilege" arguments. It found that Mr. Nixon had never seen more than a fraction of one percent of the records he was claiming as his own personal property. J.S. App. 40a, 408 F. Supp. at 345. It further found that even with respect to this small percentage that might arguably be subject to presidential or executive privilege, a number of considerations erode the confidentiality of presidential communications after a President leaves office. J.S. App. 42a-45a, 408 F. Supp. at 346-47. The court concluded that the important governmental and public interests established by the record—including the ongoing needs of the executive, legislative and judicial branches for ready access to the materials of the Nixon administration—substantially outweighed Mr. Nixon's private interests in controlling

the materials as his own personal property. J.S. App. 48a-66a, 408 F. Supp. at 348-57.

The court then carefully considered and rejected each of Mr. Nixon's claims that review and classification of the materials by government archivists would violate his personal rights of privacy, free speech and political association. J.S. App. 67a-93a, 408 F. Supp. at 357-69. Recognizing that Mr. Nixon had intermingled some personal papers in the far greater quantity of government materials in a manner which made it "impossible to segregate [them] other than by reviewing all of them," J.S. App. 79a, 408 F. Supp. at 362, the court found that screening by professional archivists pursuant to the Act was not only "a reasonable response" to the problem created by Mr. Nixon but also "the least intrusive manner" of insuring the governmental and public interests "of overriding importance" while at the same time respecting Mr. Nixon's privacy. J.S. App. 87a-88a, 408 F. Supp. at 367.

Finally, the court below rejected Mr. Nixon's contentions that preservation of the materials at issue denied him equal protection of the laws and constituted a bill of attainder.[19] It found that it was entirely appropriate for the government to act promptly with respect to the records of Mr. Nixon's administration given the fact that Mr. Nixon was the only President since 1929 whose papers were not deposited as government property in a presidential library. J.S. App. 93a-94a, 408 F. Supp. at 370. The court further found that Congress was justified in concluding that the government, rather than Mr. Nixon, was the proper custo-

[19] Mr. Nixon has abandoned his equal protection claims in this Court but continues to press his bill of attainder theory.

dian for the materials. J.S. App. 96a, 408 F. Supp. at 371. The court concluded that, given the express provisions of the Act guaranteeing Mr. Nixon's privacy and property rights through controlled access and just compensation, to be regulated and determined by the courts, Mr. Nixon's characterization of the Act fell "far short of making out a meritorious bill of attainder claim." J.S. App. 98a, 408 F. Supp. at 372.

SUMMARY OF ARGUMENT AND INTRODUCTION

This case does not present a controversy between two branches of the government concerning the "separation of powers" or "executive privilege." Rather, it involves a dispute between a private citizen and two branches of government acting together. This Court has previously held, for sound reasons of law and public policy, that claims of executive privilege may be asserted only by incumbent officials who alone are responsible to the American people for their actions. Even assuming that Mr. Nixon has some vestigial standing to assert that joint action by Congress and the incumbent President will upset the constitutional balance of governmental powers, his assertions are clearly entitled to less weight than those of his successors in office. Presidents Ford and Carter, bearing the full responsibilities of public office, simply have not perceived the threat to the Presidency hypothesized by Mr. Nixon, who has obvious personal interests in controlling the materials.

In fact, the record establishes that preservation of the materials at issue will not inhibit future Presidents and their advisors from functioning in an effective manner. Presidential materials are traditionally preserved in government libraries and often disclosed by Presidents and their advisors after their term in office has been completed. There is no realistic expectation that such communications will forever remain secret. Indeed both the Ford and Carter administrations have defended the Act from Mr. Nixon's attack in part because preservation of the materials will *facilitate* the operation of the executive branch by insuring ready access to important government documents necessary for the conduct of domestic and foreign policy. Moreover, the fact that President Ford voluntarily complied with the substance of the Act when he left office belies Mr. Nixon's contention that the "precedent" established by the statute will impair the ability of future Presidents to maintain their independence.

The government's authority to preserve the materials of Mr. Nixon's years in office is not diminished by the practices of prior Presidents with respect to the papers of their administrations. Some former Presidents have acted in a manner inconsistent with the public and governmental interests, but the majority of our Presidents—and, more importantly, all recent Presidents except Mr. Nixon—have recognized that the records of their administrations should be preserved in trust for the American people. The Nixon-Sampson agreement constituted a radical departure from the practice of every other recent President in that it gave Mr. Nixon the right to withdraw, suppress or destroy any or all of the materials as he alone saw fit.

In any event, Congress and President Ford were not constitutionally bound to follow a dubious "tradi-

tion" of private ownership that long ago lost any justification. Rather, they were entirely justified in extending the evolving system of governmental regulation of executive branch records to the materials at issue.

In this respect, it must be emphasized that the vast preponderance of the materials at issue consist of government documents generated by government employees, on government time, using government facilities, in the course of discharging their official governmental duties. These materials are thus the property of the federal government and as such were already subject to existing legislation such as the Federal Records Act, 44 U.S.C. §§ 2701-3314, and the Freedom of Information Act, 5 U.S.C. § 552.

There is equally no merit in Mr. Nixon's characterization of the Act as a punitive bill of attainder. The Act was designed to preserve materials relating to governmental affairs and did not have either the purpose or effect of punishing Mr. Nixon. As the court below found, the record available to Congress amply established the need for prompt governmental action to insure the continued availability of the governmental materials at issue. The Act insured such availability while at the same time guaranteeing Mr. Nixon's privacy and property rights pursuant to full judicial review.

Nor is there any merit in Mr. Nixon's claims that preservation and classification of the materials at issue will violate his rights to privacy and political association. Mr. Nixon had no legitimate expectation of privacy in the vast majority of the materials, which were official government documents that he neither owned

nor possessed. No decision of this Court has ever suggested that an elected official can conceal his conduct of public office on the ground that it is a "private" matter. As for any genuinely personal documents that may be intermingled among the presidential materials, the Act makes it clear that all such documents will be returned to Mr. Nixon in complete confidence.

It must be emphasized that this appeal does not present any question of the retention or publication of any particular document or tape recording disputed by Mr. Nixon. Congress was well aware that national security and other important public interests, as well as personal privacy rights, might require that some of the materials at issue be withheld from disclosure, and the Act expressly provides that such materials will be restricted from public access. Moreover, the Act provides for full judicial review of any future decision to retain or publicize any particular document or recording. There will thus be ample opportunity for the courts to balance the conflicting interests that might be asserted with respect to specific materials.

The only question presently before this Court is whether the various rights Mr. Nixon now asserts are so pervasive and so absolute that they apply to each and every one of the 42 million pages of documents and each and every portion of the 880 reels of recordings in such a manner as to prohibit their preservation and classification by professional government archivists.

ARGUMENT

I. THE ACT DOES NOT VIOLATE THE "SEPARATION OF POWERS" DOCTRINE OR IMPINGE ON "PRESIDENTIAL" PRIVILEGE.

Mr. Nixon contends that preservation of the materials of his former administration encroaches impermissibly upon the Presidency in violation of the "separation of powers" doctrine and the principle of "executive" or "presidential" privilege. App. Brief at 52 *et seq.*[20] In the discussion that follows we will address ourselves first to the question whether Mr. Nixon is the proper party to assert that the Act will impair the independence of the present and future Presidents. We will then demonstrate that even if Mr. Nixon has standing to make such a claim, the court below was correct in concluding that the Act at issue will not destroy the Presidency as Mr. Nixon predicts.

A. Only an Incumbent President Can Assert the Privileges of the Presidency.

In support of his separation of powers and presidential privilege claims, Mr. Nixon cites various cases in which an *incumbent* President refused to comply

[20] Although Mr. Nixon's brief suggests that "separation of powers" and "executive privilege" are separate and distinct concepts (App. Brief at 67-68), the principle of executive privilege is merely an application of the separation of powers doctrine to demands by other branches for information in the possession of the Executive. Or, as Mr. Nixon put it in his brief to this Court in *United States* v. *Nixon,* 418 U.S. 683 (1974), "executive privilege [is] generally recognized as a derivative of the separation of powers doctrine." Brief for Respondent at 17. Therefore, in this section of this brief we address ourselves jointly to both formulations of Mr. Nixon's "presidential" argument.

with an act or request of Congress or the courts. Those precedents are clearly inapposite to the situation presented here. Mr. Nixon is no longer the President of the United States; he was not the President when the statute he attacks was enacted by Congress and signed into law by his successor; and his claims of presidential privilege and prerogative have been opposed by both the Ford and Carter administrations. Thus, this appeal simply does not present any conflict between an incumbent President and another branch of government. The conflict here is solely between Mr. Nixon —a private citizen with no governmental authority— and Congress joined by two successive Presidents.

Under the rule announced by this Court in *United States* v. *Reynolds,* 345 U.S. 1 (1953), the fact that Presidents Ford and Carter, and their respective administrations, have not only refused to endorse Mr. Nixon's claims of "presidential" or "executive" privilege, but have actively opposed them as well, precludes Mr. Nixon from advancing those claims as a private citizen. To hold otherwise would be to allow a former President who has returned to private life to make decisions with grave public consequences:

—He could impair his successors in office by withholding records essential to the continuity of government.

—He could frustrate the political process by preventing Congress and the American people from obtaining information about the past actions of the nation's highest office for use in determining future national policies.

—He could frustrate the courts from gaining access to records essential to the just settlement of disputes—including disputes about the legality of his own conduct while in office.

—He could disclose information that should be kept confidential.

He could make all of these decisions for his own private reasons—partisan politics or petulance, a desire for financial gain, an effort to alter the judgment of history, or a determination to shield himself from accountability for his conduct in office.

For these reasons, the Court was clearly correct when it held in *Reynolds* that the privilege Mr. Nixon seeks to invoke as a private citizen

> "belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." 345 U.S. at 7-8.[21]

Mr. Nixon argues that the "executive privilege" thus reserved to incumbents in *Reynolds* is founded on the need to protect "information" relating to "ongoing government operations," whereas the "presidential privilege" he seeks to assert as a private citizen is based on the need to protect "the confidentiality of internal operations of a Presidency."[22] App. Brief at

[21] This principle has been followed consistently by the lower courts. *See, e.g., Soucie* v. *David,* 448 F.2d 1067, 1071 & n.8 (D.C. Cir. 1971); *Mitchell* v. *Bass,* 252 F.2d 513, 516 (8th Cir. 1958); *Overby* v. *U.S. Fidelity & Guaranty Co.,* 224 F.2d 158, 162-63 (5th Cir. 1955); *Thill Securities Corp.* v. *New York Stock Exchange,* 57 F.R.D. 133, 138 (E.D. Wis. 1972); *Cooney* v. *Sun Shipbuilding & Drydock Co.,* 288 F. Supp. 708, 714 (E.D. Pa. 1968). *See also In Re Investigation of World Arrangements With Relation to . . . Petroleum,* 13 F.R.D. 280, 285-86 (D.D.C. 1952).

[22] This is a variation on the argument which Mr. Nixon advanced in the court below, where he contended that *Reynolds* ap-

85-86. But this distinction does not and cannot remove the records here in issue from the *Reynolds* requirement that governmental privileges be asserted by incumbent officials.

First, assuming *arguendo* that there are two different privileges, the fact is that the information which the two privileges protect is one and the same. For example, a confidential memorandum to Mr. Nixon from the Joint Chiefs of Staff is both "presidential," in the sense that it involved him, and "military" in that it contains "information" which can affect the integrity of ongoing defense policies and programs. A decision to disclose or not to disclose based on one of the privileges will necessarily affect the other. Thus, if records are placed in Mr. Nixon's custody to enable him to serve as guardian of his "presidential" privilege and to protect "the confidentiality of internal operations of a Presidency," his decisions will preempt those which the incumbent President might make as guardian of the "executive" privilege in protecting "information" relating to "ongoing government operations." Mr. Nixon, of course, never explains how the incumbent President could assert or waive governmental privilege with respect to "information" if all these records were under Mr. Nixon's exclusive control.

Second, Mr. Nixon argues that documents relating to foreign or defense policy are different from other

plied to "executive" privilege, which he sought to distinguish from "presidential" privilege. The semantic distinction advanced by Mr. Nixon has not been recognized by any court, and, in fact, has expressly been rejected by the court below and in two other recent decisions. J.S. App. at 36, n.24, 408 F. Supp. at 343, n.24; *Dellums* v. *Powell,* No. 76-1336, Slip. Op. at 6, n.8 (D.C. Cir., Jan. 28, 1977); *Sun Oil Co.* v. *United States,* 514 F.2d 1020, 1022-25 (Ct. Cl. 1975).

presidential materials because "the decision as to whether disclosure of particular information . . . would prejudice the Nation's interest at any particular time is one best made by the incumbent or his designee under law." App. Brief at 85. But this rationale is equally applicable to a host of domestic matters as well. The interests involved in the disclosure or nondisclosure of government records are preeminently public interests, whether the records relate to foreign or domestic affairs. There is no basis for entrusting those interests to a private person who would be subject to all the usual personal motivations and to no public constraints. In short, although *Reynolds* happened to involve military secrets, it is based on a rationale that is equally applicable to decisions on the disclosure of other executive branch information—that the public interest in the disclosure or nondisclosure of government records must be assessed by incumbent officials.

Only the *incumbent* President is in a position to determine whether the public interest justifies the assertion of "presidential" or "executive" privilege in a particular situation; he alone is publicly accountable for its misuse. As the Court of Appeals for the District of Columbia Circuit recently stated in rejecting Mr. Nixon's claims of a personal presidential privilege:

> "[I]t is the new [incumbent] President who has the information and attendant duty of executing the laws in the light of current facts and circumstances, and who has the primary, if not exclusive, responsibility of deciding when presidential privilege must be claimed, when in his opinion the need of maintaining confidentiality in communications, in which of course it is he who has the ongoing interest, outweighs whatever public interest or

> need may reside in disclosure. . . . Obviously, the privilege does not disappear merely because the president who made or received the communication dies, resigns, or has completed the term. The question is, by whom must be privilege be claimed. Analytically, there is much to be said for the proposition that . . . presidential privilege must be claimed by the president or an official authorized to speak for the president." *Dellums* v. *Powell*, No. 76-1336, Slip Op. at 10-11 (D.C. Cir., Jan. 28, 1977).

The intolerable consequences of Mr. Nixon's theory are highlighted by the fact that he claims that all presidential materials must be treated as his *personal property* in order to protect his personal presidential privilege. According to Mr. Nixon, were he to die tomorrow, the decisions as to what should be disclosed or withheld from disclosure in the public interest would descend to his wife, daughters or other designees.[23] And even while he is living, there is the danger that a former President would seek to achieve financial security or some other advantage by selling his "personal property" to the highest bidder. The dangers to the government that Mr. Nixon hypothesizes from continued governmental custody of presidential materials are surely less severe than the hazards of permitting private citizens who are not publicly accountable to have this sort of unfettered discretion to publish, suppress or destroy such important government records.

Not surprisingly, there is no judicial authority for the personal presidential privilege Mr. Nixon now

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[23] The Nixon-Sampson agreement in fact provided that, in the event of Mr. Nixon's death, control over all of the presidential materials in question would "inure to the benefit of the executor of my estate. . ." App. 38.

asserts.[24] To be sure, Mr. Nixon now argues that he is entitled to claim presidential privilege as a private citizen because it is a personal privilege analogous to those surrounding the physician-patient or attorney-client relationship. App. Brief at 87. But in his prior brief to this Court in *United States* v. *Nixon, supra,* Mr. Nixon recognized that presidential privilege

> "unlike the attorney-client privilege, the husband-wife privilege, and other personal evidentiary privileges, is a Constitutional privilege *which runs to the benefit of the public, rather than to the benefit of a particular individual.*" Brief for Respondent at 83 (emphasis added).[25]

We submit that Mr. Nixon was right the first time, and that this Court should adhere to *Reynolds* and hold that presidential privilege—which is designed for the benefit of the Presidency and ultimately the government as a whole—can only be exercised by the incumbent.[26]

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[24] Mr. Nixon's reliance on *United States* v. *Nixon, supra,* is misplaced, for that case involved an *incumbent* President who, at that time, had the responsibility for determining in the first instance whether the public interest required nondisclosure of certain information. Moreover, to the extent the principle of presidential privilege rests on the need to protect the President from harassing demands that might unduly impose on his time and divert him from his duties, the rationale becomes inapplicable when the materials of a former President are left in the custody of the new administration.

[25] *Accord*: *Kaiser Aluminum & Chemical Corp.* v. *United States,* 157 F. Supp. 939, 944 (Ct. Cl. 1958) (Reed, J.).

[26] The privilege extends, of course, to the records of a former administration. Mr. Nixon acknowledged at his disposition that an incumbent President is responsible for protecting the confidences of his predecessors. Nixon Dep. Tr. at 55-56, App. 548. And the court below held that the incumbent President would be fully entitled to assert presidential privilege over any of the materials at issue. J.S. App. 37a n.26, 408 F. Supp. at 343 n.26.

In any event, assuming *arguendo,* as did the court below, that a former President has some remaining right to assert presidential privilege (J.S. App. 40a, 408 F. Supp. at 344-45), such a claim is certainly entitled to less weight than those of the incumbent. In the present case, both President Ford and President Carter have opposed Mr. Nixon's claims. As we shall now discuss, their judgment that the presidential materials should be retained by the government must be weighed heavily in determining whether the Constitution requires that a former President be permitted to publish or suppress presidential materials as his own personal property.

B. The Act Will Not Impair the Powers of the Presidency

Recognizing that the post-resignation decision of the government to preserve the materials of his administration in no way inhibited his own exercise of presidential power, Mr. Nixon is forced to rest his "separation of powers" and "presidential privilege" arguments on speculation that preservation of the records of his administration has impaired, and in the future will continue to impair, the ability of his successors to discharge their constitutional duties. The record demonstrates that Mr. Nixon's speculation is unfounded for a number of reasons.

First, the record and findings of the court below establish that, far from impairing the Presidency, the Act will enhance that institution by promoting a more orderly transition between those who hold that important office. J.S. App. 52a-57a, 408 F. Supp. at 350-52. As the court below found, presidential materials from prior administrations have ongoing importance for the efficient operation of the executive branch. J.S.

App. 55a-56a, nn. 41, 42, 408 F. Supp. at 351-52, nn. 41, 42. The need for such access is demonstrated by some of the examples established in the record and considered by the court below:

—Upon the death of President Roosevelt, President Truman found that he had a continuing need for a substantial body of President Roosevelt's wartime papers. These "Map Room Papers" were retained by Mr. Truman and his staff for their continued use, in some cases as late as 1951. Affidavit of William R. Emerson (July 22, 1975), Exs. C1 to C12. *See also* App. 247.

—At the time of the fall of the Nationalist government in China, the White House staff found it necessary to review correspondence and cablegrams between former President Roosevelt and Generalissimo Chiang Kai-shek. Emerson Affidavit, Ex. D; App. 247.

—On various occasions the White House, on behalf of the Department of Justice, obtained documents in the Roosevelt papers necessary to defend the government in various litigations. Emerson Affidavit, Exs. E, G, K; App. 247-48.

—Members of the Department of Defense under President Kennedy sought access to papers in the Eisenhower library bearing on delicate arms negotiations with France. This request for access was rejected by Mr. Eisenhower's executor and, as a result, the Kennedy administration had to conduct the negotiations without the benefit of the important information the documents contained. Affidavit of Paul H. Nitze, App. 306-11.

—In 1967 President Johnson requested and obtained other papers in the Eisenhower library concerning the extent of America's military commitment to Israel. Such access was essential because the Israeli government had copies of the documents

whereas President Johnson did not. As President Eisenhower's executor testified in the congressional hearings on the Act at issue, "this gave the Israeli Government a certain advantage . . ." *Hearings Before the Subcommittee on Printing on H.R. 16902* at 81 (Oct. 4, 1974).

—Finally, as discussed above, it is clear that the very papers Mr. Nixon now seeks to control as his own personal property were needed by the Ford administration in the conduct of both foreign and domestic policy. See pp. 5-7, *supra*.[27]

Thus concern for the institution of the Presidency, as opposed to a former President's personal desire for secrecy, dictates that the materials at issue be retained as government property.

The best evidence on the question of whether the Act is destroying the Presidency as Mr. Nixon contends is the manner in which it has affected Presidents Ford and Carter. Mr. Ford never suggested during his two and one-half years in office that the "precedent" established by the Act was impairing his ability to discharge his duties in an effective and forthright manner. To the contrary, Mr. Ford's administration consistently defended the Act against Mr. Nixon's "presidential" challenge. And, of course, since January 20 of

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[27] Congress and President Ford also had more than ample evidence to conclude that the materials of the Nixon administration would be needed for various congressional deliberations and judicial proceedings, and, in fact, such requests have been made on a number of occasions during the pendency of this litigation. *See* pp. 7-9, *supra*. *See also* J.S. App. 60a-61a, 408 F. Supp. at 354. The need to preserve the materials at issue for future congressional and judicial proceedings was one of the factors that led to passage of the Act. *See* S. Rep. No. 93-1181, 93d Cong., 2d Sess. at 1, 4 (1974); H.R. Rep. No. 93-1507, 93d Cong., 2d Sess. at 2, 3, 8 (1974).

this year, President Carter's administration has likewise defended the Act against Mr. Nixon's attack.

Even more revealing is the fact that when Mr. Ford completed his term in office, he left all of the papers of his Presidency with the government and, unlike Mr. Nixon, did not reserve the right to withdraw "any or all" materials from government control.[28] The only materials Mr. Ford retained were (i) personal effects such as furniture, clothing, his personal library, stamp and coin collections; (ii) correspondence and notes sent to him by family members; and (iii) records relating to his personal financial affairs such as his bank accounts, savings, insurance, taxes, etc. 12 Weekly Compilation of Presidential Documents at 1711. All records relating to presidential matters were left in the custody of the federal government. Those materials will be reviewed by the same government archivists whose integrity Mr. Nixon impugns. *Id.* at 1712-13.[29]

Moreover, the bulk of the documents of Mr. Ford's administration will be made available to the public as soon as they have been processed. A small percentage of the materials are restricted from public access for a thirteen-year period, after which *all* of the records will

[28] 12 Weekly Compilation of Presidential Documents 1709-17 (Dec. 17, 1976). In addition to the materials relating to his years as President, Mr. Ford provided for government control over the papers relating to his life and work (i) "as a candidate for election to, and as Member of, the Congress of the United States during the period 1948 to 1973," (ii) "as Vice President of the United States in 1973 and 1974," (iii) "as candidate for nomination and election to become President for a subsequent term," and (iv) "as participant in a variety of other public and political activities." *Id.* at 1709.

[29] Mr. Ford recognized that some personal materials might be intermingled with the records of his administration.

be publicly available to the extent permitted by law. *Id.* at 1713. But even with respect to these documents, the director of the Ford presidential library (a publicly accountable official who is to be appointed by, and subject to the authority of, the Archivist of the United States) will have the authority, without Mr. Ford's approval, to remove the access restrictions with respect to particular materials if he concludes that the reasons for the restrictions no longer exist. *Id.* at 1713. Finally, the restricted files are to be made available to succeeding administrations upon request and are to be subject to subpoena and other lawful process at all times and without Mr. Ford's prior approval. *Id.*

Thus, it is clear that the Act has not had the dire consequences on succeeding administrations that Mr. Nixon imagines. Not only was Mr. Ford able to discharge his presidential duties despite the alleged "chilling" effect of the statute, but he also plainly felt that protection of the Presidency did not require him to destroy or maintain personal control over the records of his administration after he left office. We submit that this adherence by President Ford to the substance of the Act at issue is compelling proof that the "precedent" established by the Act will not impair the ability of future Presidents to discharge their constitutional responsibilities or to maintain their independence from the other branches of our government.

In addition to the views of the two Presidents who have succeeded Mr. Nixon, the record below clearly establishes, as the court below found, that the expectation of confidentiality in "presidential" communications is never absolute and diminishes rapidly once a President leaves office. Presidential advisors are well

aware that presidential papers from former administrations are customarily deposited in government libraries and that their recommendations may be disclosed in the memoirs of the President or fellow staff members.[30] Nevertheless, there is no evidence that the likelihood of such future disclosure has inhibited presidential counselors from giving the President their best, most candid advice.[31]

Mr. Nixon himself conceded that such "confidential communications" are often published in the form of memoirs and that, as President, he had no objection to such disclosures. Thus, although Mr. Nixon cited the debate within his administration over welfare reform as an instance where confidentiality was essential, he conceded that it was proper for Mr. Moynihan

[30] Reedy Affidavit (App. 302-06); Naughton Aff. (App. 322-29); Affidavits of John Roche and Richard Goodwin, filed July 31, 1975 in the court below.

Former presidential advisors have routinely published memoirs disclosing the previously confidential deliberations of the President and his staff. Thus, Robert Kennedy's *Thirteen Days* (1969) contains a detailed description of the conversations among President Kennedy, military leaders, Congressmen and presidential advisors during the Cuban Missile Crisis. Daniel Moynihan's *The Politics of a Guaranteed Income* (1973) describes the manner in which the Nixon Administration debated welfare reform proposals, including numerous direct quotations from conversations and memoranda sent by or to the President. And Jeb Stuart Magruder's *An American Life: One Man's Road to Watergate* (1975) describes and quotes from a number of the most "sensitive" intra-White House conversations and memoranda, showing Mr. Nixon and others involved in "Watergate" in an unfavorable light. *See also,* W. Safire, *Before the Fall: An Inside View of the Pre-Watergate White House* (1975); A. Schlesinger, *The Thousand Days* (1965); P. Salinger, *With Kennedy* (1936); R. Hilsman, *To Move a Nation* (1968).

[31] *See, e.g.,* Lisagor Aff. (App. 320-21); Naughton Aff. (App. 322-29); Reedy Aff. (App. 302-06).

to disclose confidential communications concerning that debate in a book published less than two years after the fact. Nixon Dep. Tr. at 38-39, App. 534; D. Moynihan, *The Politics of a Guaranteed Income* at 80-86, 96-97, 121, 160, 164-65, 171-73, 213-15 (1973).[32]

In other words, even if a presidential advisor has a basis for assuming that his memoranda and other communications will not be immediately disclosed, he must also realize that the modern "tradition" is for Presidents and their advisors to discuss the conduct of the Presidency from their respective vantage points at the conclusions of their terms in office and for all of the documents prepared by or for a President to be retained in a government-controlled library. There is thus no reason to indulge Mr. Nixon in his dire predictions that controlled public access to some presidential materials after the termination of an administration will inhibit all candid communication in the White House.[33]

[32] Indeed, Mr. Nixon established the White House taping system to assist him in writing his own memoirs. App. 182.

[33] There is similarly no merit in Mr. Nixon's speculation that, if the Act at issue is upheld, Congress will pass other legislation pertaining to the papers of the members of this Court. Such legislalation would clearly pose substantially different considerations than those involved here. Mr. Nixon's hypothetical ignores the fundamental difference in the bases for the authority of the President and the Court under the Constitution, as well as the manner in which each renders its decisions.

The President is part of a political process. He is the only official of our government elected by, and responsible to, all the American people. He has a direct and more or less contemporaneous responsibility to the public. Such public accountability demands that the people be as informed as possible on the bases of presidential decisions. The President formulates policy and makes decisions on the basis of whatever evidence and argument

Mr. Nixon argues that candid deliberations in the White House would be seriously impaired if the records of one administration were "entrusted to the hands of successor executive officials of differing political views, motivations and philosophies." App. Brief at 76-77. But if this fear were well-founded, it would apply not only to White House materials but to the files of cabinet officials and other presidential appointees as well. Obviously such officials, as well as the President, have a need for candid advice—including advice concerning the political consequences of their actions.

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he chooses to consider without regard for precedent. In general the legitimacy of presidential decisions results from procedures designed to promote informed consent through the political process.

By contrast, the Court is carefully insulated from the political process. The legitimacy of its decisions derives not from the votes of the people but from its attention to the record in the cases before it, the quality of its reasoning, and its respect for precedent. In order to promote reasoned decision-making, the decisions of the Court are confined to the record in individual cases presented to it by others. This record and all argument are already open to public scrutiny; *ex parte* communications are strictly forbidden. The decisions of the Court are thus self-contained, and the issues and the precise phrases chosen to express the decision are themselves among the critical judgments the Court has to make. It would undermine the legitimacy of the Court, and indeed would be highly improper, for an attorney or a judge to argue that a decision of the Court did not mean what it said because it was founded on some evidence or judicial reasoning other than that contained in the formal, public record.

These differences between the executive and judicial branches have been recognized in prior statutes relating to the preservation and disclosure of federal records. *See* Freedom of Information Act, 5 U.S.C. § 552(e); Privacy Act of 1974, 5 U.S.C. § 552a. These statutes exclude judicial records from their coverage.

In any event, in order for Mr. Nixon's analogy to judicial records to be complete, the hypothetical legislation would have to provide for preservation of judicial papers in the custody *of the judiciary* and for review of such materials by members of the judicial branch.

(The recent deliberations of two successive Secretaries of Transportation concerning the flights of supersonic aircraft into the United States and the approval of interstate highway projects in the Washington, D.C. area are illustrative.) Yet the records of these officials have traditionally been left to succeeding administrations, and there is no evidence that the ability of cabinet officers to discharge their duties has been irreparably impaired as a result.[34]

Finally, a proper judgment on the effect of the Act on future Presidents must take account of the unique circumstances surrounding Mr. Nixon's departure from office and the unique provisions of the Nixon-Sampson agreement, which gave Mr. Nixon the right to withdraw any materials from government control and an absolute veto over access by anyone, including succeeding Presidents, to the records of his administration. Mr. Nixon's assumption that the actions of future Presidents will require the enactment of remedial legislation similar to the Act at issue is thus clearly unwarranted. Indeed, the recent transition in administrations—together with the arrangements for continual government control over the records of the

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[34] The most recent illustration of this tradition is the procedures that were followed when the Ford administration completed its term in January 1977. On November 19, 1976, the Archivist of the United States published a notice in the *Federal Register* reminding all executive agency heads of the provisions of the Federal Records Act and attendant administrative regulations mandating continual governmental control over all "materials made or received either in pursuance of Federal law or in connection with the transaction of public business." The Archivist cautioned the agency heads that a document "designated 'personal,' 'confidential,' or 'private,' etc., but relevant to the conduct of public business, is nonetheless an official record subject to the provisions of Federal law pertinent to the maintenance and disposal of such records." 41 Fed. Reg. 51149 (Nov. 19, 1976).

Ford administration—demonstrates that such measures should not be required with respect to the papers of future Presidents.

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There is, in short, no basis for Mr. Nixon's stated concern for the confidentiality of the communications of future Presidents. There is nothing in the Act that precludes future Presidents from asserting legitimate governmental privilege over the papers of their own administrations and those of Mr. Nixon as well. This Court has previously rejected excessive claims of separation of powers and presidential privilege when Mr. Nixon asserted them as an incumbent. *United States* v. *Nixon,* 418 U.S. 683 (1974). Surely such blanket claims must be rejected here, where the incumbent President opposes them and where Mr. Nixon concedes that he saw no more than one percent of the materials at issue. Even if Mr. Nixon has some remaining right to assert presidential privilege, the record below establishes that any intrusion on that privilege by the preservation and classification of the materials at issue by government archivists working under strict standards of confidentiality is more than justified by the important governmental and public interests in the records of his administration.

II. GOVERNMENT CONTROL OVER THE MATERIALS AT ISSUE IS SUPPORTED BY HISTORICAL AND LEGAL TRADITION AND WAS WITHIN THE AUTHORITY OF CONGRESS AND THE PRESIDENT.

Mr. Nixon asserts that his separation of powers argument is "underscored" by what he describes as the "unvarying" practice of "every" prior President. App. Brief at 90-92. This tradition, he argues, justifies his exclusive ownership and control over the millions

of documents generated by the White House staff during his tenure in office, and precludes subsequent congressional and presidential action to protect the critical governmental interests in those materials.

In the previous section we discussed the inherent invalidity of Mr. Nixon's "presidency" arguments. Here we will show that insofar as "tradition" is relevant to the Court's assessment of the constitutionality of the Act in question, the evolving historical and legal practice with respect to the papers of the President and other executive officials actually supports continued government custody. We will show that Mr. Nixon's highly selective and oversimplified view of history ignores the unmistakable evolution toward comprehensive government custody of the governmental records of all executive officials, including the President and his immediate advisors. Finally we will show that, quite apart from any such tradition, Congress and President Ford were fully empowered to act as they did to preserve the records of Mr. Nixon's years in office.

A. Preservation of the Nixon Administration Records Was Consistent with Tradition and the Practice of Recent Decades.

1. The Practices of Prior Presidents Support Preservation of the Materials at Issue.

Any analysis of the practices of prior Presidents with respect to the papers of their administrations must begin with the fact that the Executive Office of the President, and the documents it generates, have changed dramatically in recent decades. The collected papers of Thomas Jefferson, for example, amounted to only 50,000 documents over his entire lifetime, and only a small percentage of those were generated during

his Presidency. I *The Papers of Thomas Jefferson* (J. Boyd, ed. 1950) at xii. This modest amount—about one-tenth of one percent of the documents Mr. Nixon now claims—is not surprising when one considers that during Jefferson's administration the entire White House staff consisted of one secretary and a few clerks who merely copied official documents.

Nor does the amount of material generated by Mr. Jefferson differ significantly from those accumulated by other Presidents prior to the expansion of the Executive Office in the 1930's. The entire collected works of James Madison contain approximately 22,000 items; Rutherford Hayes accumulated some 75,000 items, but again only a relatively small portion came from his Presidency. Library of Congress, *A List of Collections in the Manuscript Division* (Nov. 19, 1976) at 191; I *The Papers of James Madison* (T. Hutchison, ed. 1962) at xxiv; P. Hamer, *A Guide to Archives and Manuscripts in the United States* (1961) at 492.

The volume of presidential materials did not change greatly in the early twentieth century. For example, all of the documents collected throughout the career of Woodrow Wilson amount to approximately 275,000 pages, and, again, only a portion of those were generated during his years as President. Library of Congress, *A List of Collections in the Manuscript Division, supra,* at 343. But all this changed dramatically with the Executive Reorganization Act of 1939. By 1954, the Executive Office staff, which had outgrown the White House, consisted of 1,175 persons. By 1971, under Mr. Nixon, the Executive Office staff had reached 5,395. E. Hargrove, *The Power of the Modern Presidency,* 80-81 (1974).

This dramatic increase in personnel reflected, of course, a dramatic change in the scope and complexity of the problems dealt with by the White House and in the manner in which presidential decisions were made. As James MacGregor Burns has stated:

> "The White House has changed enormously as an institution. . . . The individual presidency has come to be absorbed in the broader White House bureauracy. . . . The President is *primus inter pares,* but a great deal of decision-making emerges from the interplay of the large personal and institutional staff around the President." Affidavit of James MacGregor Burns, App. at 318.

Thus under Mr. Nixon, the Office of the President consisted not only of the White House staff, but also of the Office of Management and Budget, the Domestic Council, the National Security Council, the Council of Economic Advisors, the Council on Environmental Quality, the Office of Economic Opportunity, the Office of Telecommunications Policy, the Special Action Office for Drug Abuse Prevention, the Federal Property Council and other specialized offices and councils dealing with every phase of our federal government. E. Hargrove, *The Power of the Modern Presidency,* 80-81 (1974). *See also,* U.S. Government Manual, 1973/74 at 77-90.

The documents generated by Presidents prior to Franklin Roosevelt thus defy comparison with the vast archives generated by the institutionalized White House under Mr. Nixon—either in terms of the nature of the records involved, the interests affected, or the public importance of maintaining government custody. There is simply no basis for inferring that the practices followed in preserving the earlier records are in

any way appropriate for those of recent presidencies. Nevertheless, the fact is that many of our former Presidents considered even their far smaller, far more personal collections to be public property. President Jefferson, for example,

> "was extremely meticulous in depositing in the various departmental offices . . . every document having any relation to the conduct of public business . . . . Jefferson unquestionably employed every opportunity offered by the presidency to see to it that the public records of the office remain in public custody." Affidavit of Professor Julian P. Boyd, App. at 330-31.

Similarly, President Taft supported the idea of a national archives to house government records, including those of the President. Unfortunately, no such depository was available at the end of President Taft's term and, therefore, after leaving office, he asked the White House Executive Clerk to send his papers to him. He carefully preserved all of the documents, and they were returned to the Library of Congress a few years later.[35]

This is not to say that Mr. Nixon's contention that he has the exclusive right to destroy the records of his years in office is totally unprecedented. At least one other President—or, more accurately, his widow—exercised the same right to destroy presidential papers now sought by Mr. Nixon. Mrs. Warren Harding

[35] App. 492-93. *See* App. 488-95 for a brief description of the varying practices of eight former Presidents. *See also* H. G. Jones, *The Records of a Nation: Their Management, Preservation, and Use* (1969); J. Frank Cook, "Private Papers" of Public Officials, 38 *The American Archivist* 299, 306 (1975) (George Washington "throughout his career . . . maintained his papers for eventual use by historians. . . .").

burned more than half of the papers generated during her husband's presidency, thereby depriving succeeding administrations, Congress, and the nation as a whole of records that might have been used in enacting needed reforms.[36]

Fortunately Mrs. Harding's practice was not followed by her husband's successors. As the late Professor Herman Kahn—a leading authority on presidential papers—testified during the congressional hearings on the Act at issue:

> "[S]ince President [Franklin] Roosevelt's time, it has become a part of our unwritten constitution that a President cannot do other than to immediately leave all his White House papers to the Government when he leaves the White House. All of them, immediately upon departing the White House, have made their papers the property of the Federal Government." *Hearings Before the Subcommittee on Printing of the Committee on House Administration on H.R. 16902* at 95-96 (October 4, 1974). *See also* App. 494-95.

While relying on another portion of Professor Kahn's testimony, Mr. Nixon totally ignores this important reminder that Presidents Roosevelt, Truman, Eisenhower, Kennedy and Johnson "immediately upon departing the White House . . . made their papers the property of the Federal Government." Mr. Nixon obviously hopes to avoid the fact that the Nixon-Sampson agreement constituted a radical departure from this "tradition" of his five immediate predecessors, who

[36] Lentz, *The Warren G. Harding Papers* (1970) at 3 & n.3, App. 493-94. *See* also J.S. App. 47a-48a n.34, 408 F. Supp. at 348 n.34. Mr. Nixon acknowledges that the right to destroy historical records is part of the "tradition" that he seeks to uphold. *See* App. Brief at 92-93.

have since been joined by President Ford as well.[37] For that agreement did not provide that the papers of Mr. Nixon's years in office would be preserved as the property of the federal government. To the contrary, it specifically stated that Mr. Nixon was to "retain all legal and equitable title to the Materials," and gave Mr. Nixon the right, after three years, "to withdraw from deposit without formality any or all of the Materials . . . for any purpose or use [he] may deem appropriate." App. 39-40.

Thus, insofar as the practices of prior Presidents are relevant to an assessment of the constitutionality of the Act at issue, the "unwritten constitution" established by the actions of all recent Presidents other than Mr. Nixon supports the invalidation of the Nixon-Sampson agreement and the preservation of the records of Mr. Nixon's years in office under continued governmental control.

2. Preservation of the Materials at Issue Is Supported by the Evolving Tradition of Joint Congressional-Executive Control of the Records of the Executive Branch.

In the course of his highly selective review of "prior practice," Mr. Nixon also ignores the evolving tradition of cooperation between the executive and legislative branches in regulating the disposition of documents generated by executive officials.

With the approval and cooperation of the President, Congress has developed a comprehensive regime for

[37] As discussed above, President Ford returned to the prior "tradition" of Mr. Nixon's predecessors when he provided—in sharp contrast to the Nixon-Sampson agreement and in accord with the Act at issue—that all of his presidential papers would remain subject to governmental control upon the completion of his term in office. *See* pp. 36-37, *supra*.

the disposition of executive documents. In 1950 Congress enacted, and President Truman signed, the Federal Records Act. That statute provides that documents generated or acquired during the transaction of government business are public records, which can only be "alienated or destroyed" in accordance with publicly established regulations designed to protect the public interest. 44 U.S.C. §§ 2701 *et seq.*, 3314. *See also Dayton* v. *McGranery,* 201 F.2d 711, 713 (D.C. Cir. 1953).[38]

In 1950 and 1955 Congress authorized the creation of presidential libraries to permit government records generated during presidential administrations, as well as other historical materials relating to the President, to be housed in government depositories. *See* 44 U.S.C. §§ 2107-08. These statutes, which proceed on the assumption that White House records would remain in government hands, provided for public custody of those important materials without addressing the question of ownership.[39]

[38] Government records subject to the Federal Records Act are broadly defined to include:

> "all books, papers, maps, photographs, or other documentary materials . . . made or received by an agency of the United States Government . . . in connection with the transaction of public business and preserved or appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government . . . ." 44 U.S.C. § 3301.

The General Counsel of the General Services Administration recently outlined the comprehensive nature of the Act when former Secretary of State Kissinger purported to claim certain files relating to government business as his personal property. *See* Memorandum from General Counsel of GSA to James Rhoads, Archivist of the United States, dated February 3, 1977. *See also* p. 67 n. 59, *infra*.

[39] Mr. Nixon argues that these acts indicate legislative acquiescence in a tradition permitting outgoing Presidents to remove their

In 1966 and again in 1974 Congress, again with the approval of the incumbent Presidents, enacted and then extended the Freedom of Information Act to provide for controlled public access to many of the executive records preserved by the Federal Records Act. 5 U.S.C. § 552.[40] Under the FOIA, Congress sought to balance the public's interest in access to the records of its government with certain specific governmental privileges.[41] Similarly, in the Privacy Act of 1974, 5 U.S.C. § 552a, Congress established a definitive set of rules governing disclosure and nondisclosure of executive branch files relating to individual citizens. And of course Title II of the Act at issue—establishing a national study commission on the records of all federal officials—represents a further collaborative effort which is the forerunner of future programs to identify and protect the various public interests in government documents. 44 U.S.C. §§ 3315-3324.[42]

This Court has frequently considered the balance achieved by this evolving system of control over records of the executive branch but has never held, or even suggested, that Congress exceeded its authority when it enacted these statutes. *See Department of the Air Force* v. *Rose*, 425 U.S. 352, 360-62 (1976); *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 135-37 (1975); *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 16-20 (1974); *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 79-80 (1973). Yet Mr. Nixon now contends that the mere preservation of such documents is an unconstitutional encroachment by the legislature on executive prerogative. He argues that millions of documents that were subject to government control during his tenure in office must now be taken from government custody and must be given to him to disclose or destroy as he alone sees fit. These claims, if approved by the Court, would thus nullify both the Federal Records Act and

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records from government custody. App. Brief at 98-99. However, after a thorough analysis of the statutes and their legislative histories, the district court in the "consolidated cases" held that the Presidential Libraries Act did *not* confer ownership of presidential materials on former Presidents. *See Nixon* v. *Sampson, supra*, 389 F. Supp. at 143-45.

[40] President Ford objected to certain aspects of the 1974 amendments to the Freedom of Information Act but, significantly for present purposes, he stated that he generally supported its "laudable goals." Specifically President Ford did not raise any objection to the portion of the amendments which made it clear that the Act applied to the Executive Office of the President. *See* 5 U.S.C. § 552(e); 120 Cong. Rec. H10705 (November 18, 1974).

[41] The "consolidated cases" involved claims under the FOIA by the intervening parties to the materials here at issue. Accordingly, we presented the Court with a lengthy analysis—reprinted in the congressional hearings on the Act at issue—demonstrating that (i) the FOIA applies to "presidential materials" and (ii) Mr. Nixon's assertion of exclusive ownership conflicted with the FOIA. More particularly, we demonstrated that the exemptions in 5 U.S.C. § 552(b) did not exempt the presidential materials claimed by Mr. Nixon. *Hearings before the Subcommittee on Printing of the Committee on House Administration on H.R. 16902* (Oct. 4, 1974) at 190-99.

[42] These statutes have been implemented by extensive systems of regulations throughout all executive branch departments and agencies. The executive branch has thus been a willing participant in these attempts to improve the efficiency, continuity and accountability of the government. *See, e.g.*, 41 C.F.R. § 101-11.000 *et seq.* (GSA regulations under the Federal Records Act); 22 C.F.R. § 6.1 *et seq.* (State Department regulations under the Freedom of Information Act); Attorney General's Memorandum for the Executive Departments and Agencies on the Public Information Section of the Administrative Procedure Act, June 1967.

the Freedom of Information Act with respect to the records of Mr. Nixon's administration.[43]

* * *

What then are the lessons of history regarding presidential records?

a. The starting point for considering the historical practices discussed above is to be found in the fundamental constitutional principles which underlie our government, and which of course also constitute a part of our history. Those principles clearly bear on the responsibility of the President concerning the records of his office and provide a sound context for evaluating subsequent conduct. They make clear, for example, that while broad authority is vested in one Chief Executive, sovereignty remains in the people; that the President is accountable politically and sometimes legally for his fidelity in executing the laws and for his judgment in exercising discretionary functions; that the people, through Congress, are empowered to alter many of the actions and decisions of the Chief Executive on the basis of current information concerning the government's actions; and that continuity of government is expected despite changes in the person occupying the Presidency.

[43] It should be noted that Mr. Nixon's assertion of personal ownership and control over government documents is also at odds with congressional enactments and executive regulations designed to prevent the disclosure of national security or other sensitive information. *See e.g.*, Executive Order No. 11,652, 3 C.F.R. 339 (1974) (providing for a comprehensive classification system applicable to many of the materials at issue); 18 U.S.C. § 1905 (prohibiting disclosure of confidential information provided to executive agencies); 26 U.S.C. § 7213 (prohibiting disclosure of tax return information); 5 U.S.C. § 552a (prohibiting disclosure of confidential information concerning private citizens).

b. As noted previously, our tradition includes numerous examples of Presidents who clearly recognized that preservation of the records of their office was important to carrying out these fundamental principles, as well as examples of Presidents who perceived this connection imperfectly, if at all. It includes some who acted with high responsibility and some who did not. It includes vast historic changes in the nation and in the powers and functions of the Presidents, making it increasingly important to establish sound public records systems. And it includes major efforts by recent Presidents and Congress to do so.

c. The Act here at issue is thus clearly consistent with tradition. It is merely a further implementation of a well-established effort, underway for over four decades, to bring presidential practice into line with constitutional requirements. It is true that the Act was adopted in the face of a sudden and severe challenge from a resigning President who had demonstrated a certain insensitivity to the constitutional principles mentioned above and who, it was feared, would not exhibit the growing sense of responsibility toward presidential records shown by other recent Presidents. But the harsh circumstances giving rise to the Act merely underscore its conservative purpose. In sum, it was not the Act which departed from tradition, it was Mr. Nixon."[44]

[44] Mr. Nixon has sometimes argued that the "deeply rooted" and "unvarying" tradition he refers to is not the actual removal of White House records by all prior Presidents, which as shown above did not occur, but rather the fact that every President had the opportunity to *decide* whether he would remove such materials. *See, e.g.*, App. Brief at 92-93. Thus even though most Presidents took pains to preserve government custody of the records of their administrations, Mr. Nixon argues that the

3. This Court's References to Tradition Do Not Vest Mr. Nixon With the Right to Exclusive Personal Control of the Government Records at Issue.

Even if Mr. Nixon's contention that all prior Presidents considered the papers of their administrations to be their own personal property were true, it does not follow that Congress and President Ford were thereby precluded from extending the evolving system of regulation to the materials of the Nixon administration. To be sure, a "systematic" and "unbroken" tradition can "give meaning" to the text of a statute or constitutional provision, but even "[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation . . . ." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

In this case the "tradition" asserted by Mr. Nixon is far from "systematic" or "unbroken." Surely it cannot prohibit or subordinate remedial legislation enacted by Congress and signed by the President. Neither Congress, the President nor this Court is condemned to the "blind formalism" of adhering to traditions

fact that they had the *opportunity* to do otherwise establishes his *right* to do otherwise.

This argument does nothing more than point out that the responsibilities of Presidents regarding their records have in the past been largely dependent on self-enforcement, whereas in Mr. Nixon's case an administrative system was established to insure that public records are treated in accordance with public interests. Many legal obligations and public responsibilities depend heavily on self-enforcement—including for example the duty of a judge to decide a case impartially. But the fact that a duty has traditionally been without administrative enforcement does not preclude Congress from determining, as in this case, that self-enforcement is proving unreliable and more effective means must be established.

which no longer have any basis in reality. *See Williams* v. *Florida,* 399 U.S. 78, 103 (1970). As this Court has held, such traditions, however ancient, cannot be allowed to prevail "by sheer inertia rather than by reason of any intrinsic merit." *United States* v. *Reliable Transfer Co.,* 421 U.S. 397, 410 (1975).[45]

Significantly, none of the cases cited by Mr. Nixon holds that any such "tradition" can invalidate an act of Congress signed into law by the President. *See United States* v. *Midwest Oil Co.,* 236 U.S. 459 (1915); *Inland Waterways Corp.* v. *Young,* 309 U.S. 517 (1940); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952).[46] Only last term, this Court noted, in striking down a practice that allegedly had the blessing of history:

> "Partisan politics bears the imprimatur only of tradition, not the Constitution.
>
> " 'It may be correct that the patronage system has been followed for "almost two hundred years" and therefore was in existence when the Constitution was adopted. However . . . if the age of a perni-

[45] As Justice Holmes recognized:

> "It is revolting to have no better reason for a rule of law than that it was laid down [long ago]. It is even more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *The Path of Law,* 10 Harv. L. Rev. 457, 469 (1897).

[46] In *Midwest Oil,* for example, the Court upheld a long standing presidential practice concerning the disposition of government property, but only after finding that the practice had the clear "acquiescence" of Congress and that Congress could "disaffirm" the tradition at any time. 236 U.S. at 471, 474-75. And in *Youngstown Sheet & Tube,* the Court, in order to vindicate congressional authority, rejected excessive claims of presidential power despite an alleged "tradition" established by prior Presidents. 343 U.S. at 588-89.

cious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure. . . .' " *Elrod* v. *Burns,* 96 S. Ct. 2673, 2687 n.22 (1976), *quoting from Illinois State Employees Union* v. *Lewis,* 473 F.2d 561, 568 (7th Cir. 1972).

For these reasons, the alleged "tradition" upon which Mr. Nixon relies is not a barrier to the reform measure adopted by Congress in response to the Nixon-Sampson agreement.

B. Congress and President Ford Had Authority to Assert Public Control Over the Presidential Materials

The legislative history of the Act sets forth three legal bases for establishing government control over the materials in question.

If the materials are already government property—which Congress recognized was a decision for the courts—the statute would be an exercise of congressional power under Article IV, Section 3 of the Constitution to dispose of and make rules respecting the property of the United States.

If the materials are private property, there are two sources of legislative authority: "the Federal Government may take 'protective custody' of [presidential] material which is necessary for the continuing use of the Federal Government where it is in the public interest to do so," and "the legislation would, if necessary, exercise the power of eminent domain." H. Rep. No. 93-1507, 93d Cong., 2d Sess. (1974) at 7.[47]

[47] *See also,* S. Rep. No. 93-1181, 93d Cong., 2d Sess. (1974) at 4-6; 120 Cong. Rec. 33846 (Oct. 3, 1974) (Remarks of Sen. Ervin); 120 Cong. 33850-51 (Oct. 3, 1974) (Remarks of Sen. Nelson); 120 Cong. Rec. 33859 (Oct. 3, 1974) (Remarks of Sen. Javits); 120 Cong. Rec. 33874 (Oct. 3, 1974) (Remarks of Sen. Huddleston).

1. *The Records Were Government Property Subject to Regulation by Congress Under Article IV of the Constitution.*

Congress has plenary power to regulate the disposition of federal property under what this Court has described as the "broad terms" of Article IV, Section 3, clause 2 of the Constitution. *Kleppe* v. *New Mexico,* 96 S. Ct. 2285, 2291 (1976); *Alabama* v. *Texas,* 347 U.S. 272, 273-74 (1954); *United States* v. *San Francisco,* 310 U.S. 16, 29-30 (1940); *Ashwander* v. *TVA,* 297 U.S. 288, 336 (1936).[48] The presidential materials of the Nixon administration have been the property of the government from the outset and are thus subject to appropriate legislation under this constitutional power.

Under familiar common law principles, every employee owes a fiduciary duty to his employer, and, for that reason, the employer has an exclusive, or at least superior, right to all works created by the employee during the course of his duties. *Scherr* v. *Universal Match Corp.,* 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied,* 397 U.S. 936 (1970); *Brattleboro Publishing Co.* v. *Winmill Publishing Corp.,* 369 F.2d 565, 567-68 (2d Cir. 1966); *Nelson* v. *Radio Corporation of America,* 148 F. Supp. 1, 3 (S.D. Fla. 1957); *Sawyer* v. *Crowell Publishing Co.,* 46 F. Supp. 471, 473 (S.D.N.Y. 1942), *aff'd,* 142 F.2d 497 (2d Cir.), *cert. denied,* 323 U.S. 735 (1944).

This principle has long been recognized as applying with equal or greater force to government officials. *See,*

[48] Only last year, this Court reaffirmed that in evaluating legislation designed to preserve government property, the Court will not "reweigh the evidence and substitute [its] judgment for that of Congress." *Kleppe* v. *New Mexico,* 96 S. Ct. 2285, 2292 n.10 (1976).

e.g., Coleman v. *Commonwealth,* 25 *Gratten* (66 Va.) 865, 881 (1874). The federal courts have consistently held that the federal government owns any documents or other works created by government employees within the scope of their official duties. *Scherr, supra,* 417 F.2d at 499-500; *United States* v. *First Trust Co. of St. Paul,* 251 F.2d 686, 688 (8th Cir. 1958); *Sawyer, supra,* 46 F. Supp. at 473; *United States* v. *Chadwick,* 76 F. Supp. 919, 923 (N.D. Ala. 1948). *See also Haas* v. *Henkel,* 216 U.S. 462, 477-80 (1910). Only where the fruits of an official's labors are clearly outside the scope of his government duties may he assert exclusive personal ownership. *Public Affairs Associates, Inc.* v. *Rickover,* 268 F. Supp. 444 (D.D.C. 1967).[49]

[49] In *Rickover,* certain speeches of the Admiral were at issue. The court, finding that the speeches were written at the Admiral's home during his leisure time and that he was not on duty or acting in an official capacity when he delivered them to private audiences, held that the speeches were not government publications. 268 F. Supp. at 447-49.

Mr. Nixon attempts to avoid *Rickover* and its endorsement of the general rule that the work product of government employees is government property by arguing that it involved the right to copyright, rather than the "ownership" of, the speeches. App. Brief at 97 n.36. As stated in *Rickover,* however, the question there was whether the Admiral could assert an exclusive proprietary interest in the speeches so that no one else could use their contents without his permission:

> "May a Government employee who prepares and delivers a speech on his own time, on a subject relating to or bearing directly on his employment, claim a proprietary interest in that speech and copyright it as a protection against its unauthorized use? The fundamental determination in resolving that issue is whether the disputed speeches fall within the purview of Admiral Rickover's official duties." 268 F. Supp. at 448.

Since the Act here guarantees Mr. Nixon the right to copy all the materials, the question of *exclusive* control is also the critical question in this case, and the answer depends, as in *Rickover,* on whether or not the materials were created by Mr. Nixon and his aides within the scope of their duties or in the exercise of the powers of the President.

Mr. Nixon contends that these rules of law simply do not apply to former Presidents. But our system of government does not permit any one man to stand above others. All are equally bound by the Constitution and laws of the United States.[50] Unlike a monarch, the President's powers derive solely from the trust placed in him by the electorate. They do not inure to him as an individual. Sovereignty resides in the people, and the President serves as their fiduciary to "take Care that the Laws be faithfully executed" U.S. Const. Art. II, § 3.[51]

Applying these well-established principles, the district court in the "consolidated cases" found that, quite apart from the Act in question, the vast preponderance of the materials at issue were in fact created by executive branch officials, on government time, utilizing government resources, as part of their official government duties. The court therefore held that the materials were the property of the federal government and not the personal property of Mr. Nixon. *Nixon* v. *Sampson,* 389 F. Supp. 107, 133-37 (D.D.C. 1975).[52]

[50] "All the officers of the government, from the highest to the lowest, are creatures of the law and bound to obey it." *United States* v. *Lee,* 106 U.S. 196, 220 (1882).

[51] As the Court of Appeals stated in *Nixon* v. *Sirica,* 487 F.2d 700, 711 (D.C. Cir. 1973):

> "Though the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands: 'With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law. . . .' *Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen.*" (Emphasis added.)

[52] The absurdity of Mr. Nixon's ownership claim is all the more evident when one considers that the vast preponderance of the records claimed as his property were produced and received by other executive branch officials and were never even seen by him.

2. Congress Had Power to Assert Custody Over the Records Even If They Were Not Already Government Property.

(a) *Power to protect the continuity of the Government.* The government's paramount interest in the information contained in the records of previous administrations was explicitly recognized by Justice Story in *Folsom* v. *Marsh*, 9 Fed. Cas. 342 (C.C.D. Mass. 1841)—the leading decision cited by Mr. Nixon in support of his contention that *he alone* should have control over access to the records of his Presidency.

In *Folsom,* Justice Story was confronted with the competing copyright claims of two private parties to some of the personal papers of President Washington —papers which had already been published and which were therefore fully available to both government officials and the public alike. Justice Story was thus not confronted with the situation here, where a private citizen seeks to assess personal ownership *as against the government* over records that are not otherwise available. Nevertheless, Justice Story anticipated the instant case when he warned that there might well be future cases where

> "from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government to give them publicity, even against the will of the writers." 9 Fed. Cas. at 347.

He thus recognized that, regardless of the ownership of presidential records, the information they contain is often so vital to the functioning of the government

that no private citizen can be allowed to keep them from succeeding administrations.[53]

As Justice Story perceived, the Constitution contemplates a continuing government, with many programs extending beyond the tenure of any one President. Congress is authorized by its substantive legislative powers, as well as by the "necessary and proper" clause,[54] to provide for the orderly transition from one Administration to another.[55] Without the aid of Con-

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[53] Mr. Nixon attempts to limit *Folsom* to documents involving only matters of "national security and current government business." App. Brief at 117. But, as the portion of Justice Story's opinion quoted above makes clear, the need for preserving presidential papers recognized in *Folsom* extends to documents "embracing *historical* . . . information" as well. 9 Fed. Cas. at 347 (emphasis added).

Similarly, *In re Roosevelt's Will*, 73 N.Y.S. 2d. 821 (Sur. Ct. 1947), provides no support for Mr. Nixon's claim of personal ownership but rather is entirely consistent with the view that, regardless of legal title, the government has a paramount interest in the papers of a former President. The question of ownership was neither raised nor discussed in the *Roosevelt* case. The court simply declared that President Roosevelt's gift of his papers to a presidential library maintained and controlled by government archivists was valid to confer such title as he might have had. The court noted that President Roosevelt had publicly stated *"that the ownership and title of all the papers, books, et cetera, should be in the Federal Government itself." Id.* at 823 (emphasis added).

[54] Constitution, Art. 1, Sec. 8, cl. 18.

[55] An example of an exercise of this power is the Presidential Transition Act of 1963, where Congress provided for a number of services and facilities to insure the orderly transition of power from one Administration to the next. In that Act, Congress declared that:

> "The national interest requires that such transitions in the office of President be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government. . . ." 3 U.S.C. § 102 note.

gress, an incoming President would be powerless to prevent his predecessor from disrupting the continuity of government.[56]

Mr. Nixon now concedes that "the right of the executive branch to secure particular materials of [his] administration for current government business has been established by historical practice and by *Folsom* v. *Marsh*." App. Brief at 116-17. But elsewhere he asserts, rather inconsistently, that "the right to control access to and disposition of the materials of his office" is vested in him personally by the Constitution and is not subject to abridgement by Congress. App. Brief at 94. And, of course, he fails to explain how succeeding administrations will be able to enforce the right he concedes they have under *Folsom* v. *Marsh* if, pursuant to the Nixon-Sampson agreement, he refuses to allow such access or exercises his "right" to destroy the documents sought by his successors.

(b) *Power of eminent domain.* It is clear that the government was also authorized to retain and preserve many of the documents at issue, without regard for their legal title, through a proper application of its extensive powers of eminent domain. *United States* v. *Gettysburg Electric Ry. Co.*, 160 U.S. 668, 680-81 (1896). *See also Roe* v. *Kansas ex rel. Smith*, 278 U.S. 191, 192-93 (1929). This Court has consistently held that congressional findings on the public importance of such property are not to be lightly set aside. *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 551-52 (1946); *Berman* v. *Parker*, 348 U.S. 26, 32 (1954).

[56] Legislation preserving White House records also serves the constitutional purpose of helping to insure that incumbent Presidents faithfully execute the laws.

Here it is clear that the records of one of the most important and turbulent periods in our nation's history were quite properly preserved in order to insure that government officials and the nation as a whole would learn from our past mistakes so as to not be condemned to relive them in the future.[57]

In sum, Congress and President Ford had ample authority to establish government custody over the records of Mr. Nixon's years in office, and such action was entirely consistent with the nation's tradition.

III. THE ACT DOES NOT VIOLATE ANY OF MR. NIXON'S PERSONAL RIGHTS

In addition to his claim that the Act will irreparably injure the Presidency, Mr. Nixon alleges that the statute abridges several of his own constitutional rights. It should be noted at the outset that all of these arguments are based on an erroneous premise, namely that Mr. Nixon "owned" the materials at issue prior to the Act. If he is wrong on this issue (see pp. 56-59,

[57] Mr. Nixon concedes that government preservation of even personal papers for future historical examination is not unprecedented. App. Brief at 141, n.64. He notes that following the assassination of President Kennedy, the government seized the diaries, political writings, and other personal papers of Lee Harvey Oswald. *See* 31 Fed. Reg. 13968-74 (Oct. 31, 1966); *Porter* v. *United States*, 473 F.2d 1329, 1332 (5th Cir. 1973). Legislation was later enacted to provide for the continued preservation of the materials and for compensation to Oswald's heirs. 79 Stat. 1185, Pub. L. No. 89-318. As Mr. Nixon notes, there was never any challenge to the constitutionality of that legislation.

Mr. Nixon attempts to distinguish this precedent on the grounds that the Oswald legislation was enacted after the initial seizure of the papers. We submit that if there is any force to this distinction, it is that the Act presently under consideration, which was signed into law prior to government action, is, for that reason, all the more constitutional.

supra), his arguments all must fail, for it cannot be a bill of attainder, invasion of privacy, unreasonable search and seizure, or abridgement of freedom of speech for the government to provide for the preservation, use, and disclosure of documents which have been owned by the government all along.

We now turn to an examination of each of Mr. Nixon's personal constitutional claims.

A. The Act Does Not Constitute a Bill of Attainder

Mr. Nixon contends that the Act is an unconstitutional bill of attainder because it regulates the disposition of the papers of his administration without establishing similar rules with respect to the papers of all other past and future Presidents. App. Brief at 130-41. The court below unanimously rejected this argument. J.S. App. 97a-103a, 408 F. Supp. at 371-74. The court found that it was entirely appropriate for the government to act promptly to preserve the records of Mr. Nixon's administration, given the fact that Mr. Nixon was the only President since 1929 whose papers had not been deposited in a government-controlled presidential library. J.S. App. 93a-94a, 408 F. Supp. at 370. The court further found that Congress was entirely justified in concluding that the government, rather than Mr. Nixon, was the proper custodian for the materials at issue. J.S. App. 96a, 408 F. Supp. at 371. The court concluded that, particularly since the Act fully protects any legitimate privacy and property rights that Mr. Nixon has in any of the materials, (J.S. App. 102a, 408 F. Supp. at 373-74) Mr. Nixon's characterization of the Act fell "far short of making out a meritorious bill of attainder claim." J.S. App. 98a, 408 F. Supp. at 372.

In order to escape these sound conclusions of fact and law, Mr. Nixon now argues that *United States* v. *Brown,* 381 U.S. 437 (1965), stands for the proposition that a bill of attainder exists whenever a statute affects an individual or group of persons without applying to all other persons who are arguably similarly situated. This is plainly incorrect. The fact that only one person is in possession of government property clearly does not prevent the government from recovering that property. And even where the person has legal title to property, the power of eminent domain permits the government to take it for government use (so long as just compensation is paid) without simultaneously taking the property of all persons similarly situated.

Acceptance of Mr. Nixon's reading of *Brown* would have the effect of overturning numerous decisions of this Court holding that the government may address an immediate aspect of a problem without concurrently attempting to eliminate the entire evil. As the Court stated in *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379, 400 (1937):

> "If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms."

Similarly in *Katzenbach* v. *Morgan,* 384 U.S. 641, 657 (1966), the Court held:

> "[I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' . . . that a legislature

> need not 'strike at all evils at the same time,' . . . and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind'. . . ."[58]

The distinguishing feature between the remedial legislation that was upheld in *Parrish* and *Katzenbach* and the unlawful bill of attainder that was struck down in *Brown* is that a bill of attainder involves a finding of guilt and the imposition of punishment without the benefit of judicial review. If Mr. Nixon were correct in his assertion that a bill of attainder exists whenever a particular person or group is the subject of a legislative enactment, legislation would become unconstitutional whenever Congress addressed itself to an immediate issue and failed to enact a comprehensive legislative scheme.

In arguing that a bill of attainder need not be punitive in nature, Mr. Nixon ignores *United States* v. *O'Brien,* 391 U.S. 367 (1968), where the Court—speaking through Chief Justice Warren who had authored *Brown* three years before—explicitly restated the principle that

> "In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements—specificity in identification, *punishment,* and lack of a judicial trial—are contained in the statute." 391 U.S. at 383 n.30 (emphasis added).

Mr. Nixon similarly ignores the Court's ruling that only the "clearest proof" of such a punitive character will suffice to void a statute as a bill of attainder.

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[58] *Accord: San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 39 (1973).

Flemming v. *Nestor,* 363 U.S. 603, 617 (1960). In the instant case, it is clear that both the purpose and effect of the Act at issue is the preservation of the record of the Nixon administration and not the punishment of Mr. Nixon. Mr. Nixon does not cite any evidence in the Act or its legislative history demonstrating that Congress was acting irrationally or out of malice. To be sure, Mr. Nixon quotes passages from the legislative history demonstrating that Congress was deeply concerned that the Nixon-Sampson agreement might forever frustrate a proper history of his administration. App. Brief at 132 n.60. But he ignores the fact that the result of this concern was not a punitive measure depriving him of liberty or property without justification or compensation, but rather a carefully limited response that respects his legitimate interests as far as possible consistent with the paramount government and public interests at stake.[59]

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[59] As "evidence" in support of his argument that he was singled out by Congress for special treatment, Mr. Nixon relies on the fact that when former Secretary of State Kissinger recently left office his legal adviser told him that he could claim some materials relating to government business as his personal property. Of course, these *post hoc* views of one individual have no bearing on the validity of Congress' action in 1974. In point of fact, on January 4, 1977, the Archivist of the United States asked to inspect the Kissinger papers to determine whether they were, in fact, "personal" in nature. *See* Letter from James Rhoads to Henry Kissinger, Jan. 4, 1977. And on February 3, 1977 the General Counsel of the General Services Administration rendered a comprehensive legal opinion challenging the analysis of the State Department's legal adviser and supporting the Archivist's position. *See* Memorandum from Donald Young to James Rhoads, dated Feb. 3, 1977. In any event, The Reporters Committee for Freedom of the Press, the American Historical Association, and the American Political Science Association are presently challenging Mr. Kissinger's action. *The Reporters Committee for Freedom of the Press, et al.* v. *Vance, et al.,* C.A. No. 77-0220 (D.D.C.), filed February 8, 1977.

Mr. Nixon generally ignores the fact that the Act guarantees him the right to inspect, copy and use all of the materials at issue. Section 102(c). Similarly, he belittles the Act's provision for just compensation, following a full judicial determination, for any reduction in his property rights (Section 105(c)) —a provision utterly at war with his characterization of a vindictive Congress bent on seizing his property without regard for his individual rights. Finally, Mr. Nixon ignores the provisions in the Act which insure the nondisclosure of his legitimate privileged communications, again with the benefit of full judicial review. Sections 104(a)(5), 104(a)(7), 105(a). Nevertheless, all of these provisions exist, and they demonstrate that the Act is a limited, nonpunitive, and completely proper response to the exigent situation created by Mr. Nixon himself.

B. The Act Is Not an Unlawful Invasion of Mr. Nixon's Privacy or an Unreasonable Search and Seizure.[60]

Relying on decisions from vastly different contexts, Mr. Nixon contends that the segregation by government archivists of the minute percentage of personal papers which he intermingled with the vast preponderance of government records preserved by the Act constitutes an invasion of his personal privacy and an unreasonable search and seizure. Mr. Nixon's arguments fail for a number of reasons.

First, Mr. Nixon's assertion that the Act was designed to seize and publicize his personal papers ignores

[60] The brief of appellees Lillian Hellman, *et al.* treats Mr. Nixon's privacy and search and seizure claims in greater detail. In this section we will merely emphasize some of the major infirmities in Mr. Nixon's position.

the fact that the statute directs that any such papers be returned to Mr. Nixon as soon as possible and in complete confidence. Section 104(a)(7). This Court should not countenance Mr. Nixon's litigation tactic of broadening the Act in order to raise constitutional problems which do not exist, particularly where a more narrow construction is in Mr. Nixon's own interest and the appellees (including the government agency which will administer the Act) concede that the statute should be construed more narrowly. As the Court has stated, the "task is not to destroy the Act . . . but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers,* 413 U.S. 548, 571 (1973).[61]

Mr. Nixon is engaging in sheer speculation when he argues that the government may apply the Act to truly personal materials in a manner inconsistent with the Act itself. Moreover, the Act expressly provides for judicial review of any archival decision to retain or publicize any of the materials. Section 105(a). These procedures will provide ample protection for any legitimate privacy interest Mr. Nixon may have in any particular document. There is thus no need for the

[61] As noted above, the implementing regulations thus far proposed leave no doubt but that Mr. Nixon's personal papers will be returned to him. *See* Proposed Regulations, Sections 105-63.104(b), 401-5(a) (April 13, 1976) quoted at pp. 17-18 *supra.*

Mr. Nixon argues that the Act applies to all materials having historical or commemorative value, even if they are personal in nature. App. Brief at 33-34, 143. But Section 101 of the Act expressly limits its coverage to "*Presidential* historical materials" (*i.e.,* those relating to Mr. Nixon's presidential actions). There is no indication in the legislative history that Congress intended the statute to apply to family matters, doctor-patient consultations, and the like.

Court to ignore the clear intent of the Act and to rule on some hypothetical misapplication of its terms. *See Watson* v. *Buck,* 313 U.S. 387, 402 (1941); *Communist Party* v. *SACB,* 367 U.S. 1, 71-72 (1961).[62]

Second, Mr. Nixon's contention that segregation of his personal papers from the government records preserved by the Act is itself unconstitutional glosses over the fact that the archivists who will accomplish this task have "an unblemished record for discretion" and that such archivists have segregated the personal papers of all of our recent former Presidents. J.S. App. 45a, 83a, 408 F. Supp. at 347, 365. *See* Affidavit of Harry J. Middleton, App. 233-34; Affidavit of William R. Emerson, App. 254-55; Affidavit of John Stewart, App. 264. Indeed, Mr. Nixon ignores the fact that he had no doubt about the integrity and discretion of such government archivists when he provided for their review of his own vice-presidential papers. App. 267-68, 270, 274.

Third, the vast preponderance of the materials at issue are government records which Mr. Nixon neither

[62] The danger of such an advisory opinion is compounded by Mr. Nixon's selective use of the regulations which have thus far been proposed. For example, Mr. Nixon notes that the court below was troubled by the fact that the *initial* draft of the regulations did not provide for adequate notice to Mr. Nixon of archival decisions so that he might be able to assert his right to the full judicial review provided in the Act. App. Brief at 42. But Mr. Nixon fails to add that following the decision of the court below the proposed regulations were revised to provide Mr. Nixon and his heirs with just such notice. *See* Proposed Regulations, Section 105-63.401(c) (April 13, 1976).

Mr. Nixon's failure to mention this important addition to the regulations underscores the lack of merit in his position that this Court should speculate on the details of future public-access regulations which are not yet in final form, much less on the application of the proposed regulations to particular materials.

owned nor possessed. Of the estimated 42 million records, Mr. Nixon admitted that he saw no more than 200,000, and the overwhelming majority of these relate to government business rather than to Mr. Nixon's personal affairs. Clearly, nothing in the Constitution prohibits the government from retaining its own records. *See Wilson* v. *United States,* 221 U.S. 361, 380 (1911); *Davis* v. *United States,* 328 U.S. 582, 587-91 (1946).

This Court has never suggested that an elected official may conceal his conduct in office from public scrutiny on the grounds that it is his own "private" affair. To the contrary, the Court has held on a number of occasions that the actions of government officials should generally be open to the American people, who are "the final judge of the proper conduct of public business." *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 495 (1975). *See also New York Times* v. *Sullivan,* 376 U.S. 254 (1964). Similarly, the Court has recently warned against applying privacy cases involving marriage, procreation and similar personal and family matters to other, far more public, contexts. *Paul* v. *Davis,* 424 U.S. 693, 712-13 (1976).

Fourth, the government did not "seize" anything from Mr. Nixon. The materials in question were simply left in the possession of the government when Mr. Nixon and his staff left office. This Court has held that the Fourth Amendment does not apply when the government finds itself in possession of property without any intrusion into a man's home or other zone of privacy. *See Burdeau* v. *McDowell,* 256 U.S. 465, 474-76 (1921); *Couch* v. *United States,* 409 U.S. 322, 331-32 n.14 (1973). *See also Meister* v. *Commissioner of Internal Revenue,* 504 F.2d 505, 508-11 (3d Cir. 1974),

cert. denied, 421 U.S. 964 (1975). There is thus no basis for the procedure demanded by Mr. Nixon, which would require shipment of 42 million government records to California followed by a "subpoena" for the production of the documents relating to governmental matters.

In sum, Mr. Nixon's arguments avoid the real issue which confronted Congress and President Ford in 1974 and which now confronts this Court: Given the fact that more than 99 percent of the materials at issue are government records relating to governmental matters, does the Fourth Amendment prohibit the government from reviewing those records on a confidential basis for the purpose of segregating a tiny fraction of personal documents for return to Mr. Nixon? Or, conversely, does the fact that Mr. Nixon intermingled his personal records in governmental files bootstrap him into a position where he can claim a constitutionally protected privacy right in—and exclusive control over—millions of government records relating to the Presidency? We submit that under the teaching of this Court that a congressional enactment—even in the Fourth Amendment context—is entitled to a "strong presumption of constitutionality . . . especially when it turns on what is 'reasonable,' "[63] the Act in question represents a proper resolution of the problem created by Mr. Nixon himself.

[63] *United States* v. *Watson,* 423 U.S. 411, 416 (1976) quoting *United States* v. *Di Re,* 332 U.S. 581, 585 (1948).

C. The Act Does Not Constitute a Violation of Mr. Nixon's First Amendment Rights.[64]

There is equally no merit in Mr. Nixon's contention that preservation of the records of his administration constitutes a violation of his First Amendment rights of speech and association. Again, Mr. Nixon's argument ignores the fact that the Act applies to official government records created or received by public officials in the exercise of their governmental duties. To be sure, many of the decisions recorded in these documents were in part the result of "political" considerations. But neither the First Amendment nor any decision of this Court permits elected officials to use—or misuse—their governmental authority free from public scrutiny merely because their actions are in part "political." *See United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers,* 413 U.S. 548, 564 (1973); *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968).[65]

The extravagant nature of Mr. Nixon's claims is manifest in his own definition of the "political" documents which, according to his theory of the First Amendment, are his to suppress or destroy as he alone sees fit. For example, he testified that, in his opinion, memoranda between presidential staff members suggesting the termination of government contracts for

[64] Since the brief of Lillian Hellman, *et al* discusses this issue in some detail, this section will merely emphasize some of the major infirmities in Mr. Nixon's position.

[65] It should be noted that Mr. Nixon argued to this Court in *United States* v. *Nixon,* 418 U.S. 683 (1974), that disclosure of the materials there would violate his First Amendment right of political expression. Brief for Respondent at 69-72. The Court did not even deem it necessary to respond to this contention in its opinion.

political reasons are "political" documents rather than government records. Nixon Dep. Tr. at 88-90, Ex. D, App. 576-77, 649. Mr. Nixon similarly stated that his decision to use the Central Intelligence Agency to interfere with the FBI's investigation of Watergate was "political" and "to an extent personal." Nixon Dep. Tr. 24-25, App. 522-23.

The records concerning abuses of power during the Nixon administration are not the only ones which would be subject to Mr. Nixon's exclusive control should this Court accept his First Amendment theories. According to the definition endorsed by Mr. Nixon, a document is "political"—and hence his personal property—if it relates to "public leadership" or "the marshalling of public and political support for the President's policies. . . ." Appellant's Juris. Statement at 26. Thus, a memorandum from a staff assistant to a member of the National Security Council concerning the deployment of strategic weapons would be protected by Mr. Nixon's First Amendment rights—and hence exempt from disclosure to succeeding Presidents—if it contained any suggestion that the President's decision on the issue should include a consideration of the "political" reaction of the American people or the need for "political" leadership by the President to secure public or congressional support.

Extending personal First Amendment protection to the records generated by public officials in the conduct of their duties would effectively shelter them from public accountability for the use of their governmental powers. Mr. Nixon's unprecedented theory—which has never been endorsed by this Court—would treat a

President's public office as a mere attribute of his private personality and would permit him to exclude his conduct in office from public scrutiny just as he might exclude his family life or religious views. Such a concept of the "political" activities protected by the First Amendment would also entitle other public officials and employees to claim that the public is prohibited from "prying" into the "political" manner in which they discharge their duties. The Federal Records Act and the Freedom of Information Act would be nullified, and we would return to a state of secrecy inimical to constitutional processes.[66]

Nothing in the First Amendment countenances such a result. To the contrary, the First Amendment was conceived in "the struggle . . . to establish and preserve the right of the English people to full information in respect to the doings and misdoings of their government." *Grosjean* v. *American Press Company*, 297 U.S. 233, 247 (1936).

Again, the Court need not embrace Mr. Nixon's extreme position in order to accommodate his legitimate First Amendment rights. To the extent that Mr. Nixon has intermingled personal political documents among the government records preserved by the Act, those materials will be returned to him pursuant to the Act. Again, the only burden on Mr. Nixon's First Amendment rights is that of the review of the materials by professional and discrete archivists which, as the court

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[66] As Patrick Henry stated:

"The liberties of the people never were . . . secure when the transactions of their rulers may be concealed from them." 3 Elliot 170.

below found, is "certainly not significant enough to outweigh countervailing government interests." J.S. App. 92a, 408 F. Supp. 369.

Finally, it must again be emphasized that any further burden on Mr. Nixon's First Amendment rights—such as the publication of a document dealing with his private political association—is pure speculation in light of the Act's express terms prohibiting such disclosures and guaranteeing full judicial review before any such public access is granted. Sections 104(a)(5), (a)(7), 105(a). There is thus no factual or legal foundation for Mr. Nixon's contentions that the necessary consequence of the Act at issue will be the improper dissemination of his private thoughts.

CONCLUSION

Mr. Nixon argues that this case arrives at this Court with the "distinct handicap" that "public passions are still high" concerning his conduct of his Presidency. Undoubtedly Mr. Nixon would prefer that the Court ignore the national trauma created by his actions in office and thus ignore the legitimate concern of Congress and President Ford over the suppression and possible destruction of the records of his administration.

It is not necessary for this Court to pass judgment on Mr. Nixon's Presidency. That judgment properly belongs to history and the American people. But that judgment will only properly be made if the materials at issue are preserved. For that reason alone, as well

as for all the other reasons stated above, the judgment of the district court should be affirmed.

Respectfully submitted,

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